No. 92-755

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FIRST NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

v.

SUNSHINE-JR. FOOD STORES, INC.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION OF FIRST NATIONAL LIFE INSURANCE COMPANY FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq. ("ERISA"), preempts state law claims for breach of contract, tort, and an accounting in an action brought by an insurer against an employer under an ERISA employee welfare benefit plan.

2. Whether ERISA authorizes an award of monetary relief in an action brought by an insurer against an employer under an ERISA employee welfare benefit plan.

3. Whether an employer owes a fiduciary duty to its insurer when the employer collects, holds, and remits premiums from its employees and determines employee coverage for the insurer under an ERISA employee welfare benefit plan and the information provided to the insurer regarding such coverage is peculiarly and solely within the control of the employer.

4. Whether the acts of a dual agent who acts in the best interests of one party but not the other are chargeable to the entity for whom said agent is acting.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner/Plaintiff:

First National Life Insurance Company ("FNL")

Parent Corporation of FNL:
American Life Assurance Corporation

Parent Corporation of American Life Assurance Corporation:
New South Investment Corporation

Subsidiary of FNL:
Capitol Towers, Inc.-

Respondent/Defendant:
Sunshine-Jr. Food Stores, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
REFERENCE TO REPORT OF OPINIONS	1
JURISDICTIONAL STATEMENT	1
STATUTES AND REGULATIONS INVOLVED IN THIS CASE	1
STATEMENT OF THE CASE	1
ARGUMENT	4
A. ERISA Preemption	5
B. Monetary Relief Under ERISA	14
C. Fiduciary Duty Owed By Sunshine to FNL	17
D. Dual Agency	18
CONCLUSION	19
APPENDIX	1a

TABLE OF AUTHORITIES

CASE CITED	Page
Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2d Cir.), *cert. denied*, 493 U.S. 811, 110 S. Ct. 57, 107 L. Ed. 2d 25 (1989)	7,8,12
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S. Ct. 1895, 68 L. Ed. 2d 402 (1981)	5
Amos v. Blue Cross-Blue Shield of Alabama, 868 F.2d 430 (11th Cir.), *cert. denied*, 493 U.S 855, 110 S. Ct. 158, 107 L. Ed. 2d 116 (1989)	11
Anschultz v. Connecticut General Life Ins. Co., 850 F.2d 1467 (11th Cir. 1988)	11
Bay Shore Properties, Inc. v. Drew Corp., 565 So. 2d 32 (Ala. 1990)	19
Bishop v. Osborn Transp., Inc., 838 F.2d 1173 (11th Cir.), *cert. denied*, 488 U.S. 832, 109 S. Ct. 90, 102 L. Ed. 2d 66 (1988)	14,15
Brasher v. First Nat'l Bank of Birmingham, 232 Ala. 340, 168 So. 42 (1936)	18
Chauffeurs, Teamsters and Helpers v. Terry, 494 U.S. 558, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990)	16
Clark v. Coats & Clark, Inc., 865 F.2d 1237 (11th Cir. 1989)	11
Christopher v. Mobil Oil Corp., 950 F.2d 1209 (5th Cir.), *cert. denied*, 1992 U.S. Lexis 5637, 61 U.S.L.W. 3256 (1992)	12
Cordes v. Wooten, 476 So. 2d 89 (Ala. 1985)	19
Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272 (6th Cir. 1991), *cert. dismissed*, ___ U.S. ___, ___ S. Ct. ___, 120 L.Ed. 2d 931, 1992 U.S. Lexis 4763 (1992) and *cert. denied*, 15 Employee Benefits Cas. (BNA) 2056 (1992)	10,13
Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821 (1st Cir. 1988)	14

Table of Authorities Continued

	Page
Farlow v. Union Cen. Life Ins. Co., 874 F.2d 791 (11th Cir. 1989)	11
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)	17
Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550 (6th Cir. 1987)	7
First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc., 960 F.2d 1546 (11th Cir. 1992)	1,10,15,17,19
FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990)	5
Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987)	6
General Elec. Co. v. New York State Dept. of Labor, 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283 (1990)	7,12
Giardiello v. Balboa Ins. Co., 837 F.2d 1566 (11th Cir. 1988)	12
Gonzales v. Prudential Ins. Co. of America, 901 F.2d 446 (5th Cir. 1990)	5
Hartle v. Packard Elec., 877 F.2d 354 (5th Cir. 1989)	7,9
HealthAmerica v. Menton, 551 So. 2d 235 (Ala. 1989)	9
Howard v. Parisian, Inc., 807 F.2d 1560 (11th Cir. 1987)	11
Hospice of Metro Denver, Inc. v. Group Health Ins. of Oklahoma, Inc., 944 F. 2d 752 (10th Cir. 1991)	8
Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990)	5,16
Krause v. Dresser Industries, Inc., 910 F.2d 674 (10th Cir. 1990)	9

Table of Authorities Continued

	Page
Lee v. E. I. DuPont de Nemours and Co., 894 F.2d 755 (5th Cir. 1990)	10
Lister v. Stark, 890 F.2d 941 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 579, 112 L. Ed. 2d 584 (1990)	10
Mackey v. Lanier Collections Agency & Service, Inc., 486 U.S. 825, 108 S. Ct. 2182, 100 L. ED. 2d 836 (1988)	5,6
Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985)	14,15
Memorial Hosp. System v. Northbrook Life Ins. Co., 904 F.2d 236 (5th Cir. 1990)	8,12
Mullenix v. Aetna Life & Cas. Ins. Co., 912 F.2d 1406 (11th Cir. 1990)	11
Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988)	17
Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986)	8
Nash v. Trustees of Boston University, 946 F.2d 960 (1st Cir. 1991)	9
National Cos. Health Benefit Plan v. St. Joseph's Hosp., 929 F.2d 1558 (11th Cir. 1991)	11
Nu-Air Mfg. Co. v. Frank B. Hall & Co. of New York, 822 F.2d 987 (11th Cir. 1987)	19
Perkins v. Time Ins. Co., 898 F.2d 470 (5th Cir. 1990)	7
*Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), *cert. denied*, 493 U.S. 1093, 110 S. Ct. 1166, 107 L. Ed. 2d 1068 (1990)	10,13
Phillips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986), cert. denied, 481 U.S. 1016, 107 S. Ct. 1893, 95 L. Ed. 2d 500 (1987)	10

Table of Authorities Continued

	Page
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987)	5,8
Pitrat v. Garlikov, 947 F.2d 419 (9th Cir. 1991)	13
Pizlo v. Bethlehem Steel Corp., 884 F.2d 116 (4th Cir. 1989)	9
Pohl v. National Benefits Consultants, Inc., 956 F.2d 126 (7th Cir. 1992)	18
Powell v. Chesapeake & Potomac Tel. Co. of Virginia, 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170, 106 S. Ct. 2892 90 L. Ed. 2d 980 (1986)	14
Provident Life & Acc. Ins. Co. v. Waller, 906 F. 2d 985 (4th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 512, 112 L. Ed. 2d 524 (1990)	10
Rebaldo v. Cuomo, 749 F.2d 133 (2d Cir. 1984), *cert denied*, 472 U.S. 1008, 105 S. Ct. 2702, 86 L. Ed. 2d 718 (1985)	7
Retirement Fund Trust of Plumbing v. Franchise Tax Bd., 909 F.2d 1266 (9th Cir. 1990)	7
Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989)	9
Sanson v. General Motors Corp., 966 F.2d 618 (11th Cir. 1992)	12,13
Sea Calm Shipping Co., S.A. v. Cooks, 565 So. 2d 212 (Ala. 1990)	19
Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983)	5,6,7
Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir. 1992)	10
Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986)	15
Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 107 S. Ct. 884, 93 L. Ed. 2d 837 (1987)	7,14

Table of Authorities Continued

	Page
Teper v. Park West Galleries, Inc., 431 Mich. 202, 427 N.W. 2d 535 (1988)	9
United Steelworkers of America v. Connors Steel Co., 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096, 109 S. Ct. 1568, 103 L. Ed. 2d 935 (1989)	14
Varhola v. Doe, 820 F.2d 809 (6th Cir. 1987)	14
Walters v. Marathon Oil Co., 642 F.2d 1098 (7th Cir. 1981)	15
Warren v. Society Nat'l Bank, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2256, 114 L.Ed. 2d 709 (1991)	15,16
Williams v. Wright, 927 F.2d 1540 (11th Cir. 1991)	11
Wooten v. Wooten, 270 Ala. 191, 117 So. 2d 192 (1959)	16
Worley v. Worley, 388 So. 2d 502 (Ala. 1980)	16

OTHER AUTHORITIES

28 U.S.C. §1254(1)	1
28 U.S.C. §1291	4
28 U.S.C. §1331	2
28 U.S.C. §1332	2
29 U.S.C. §1109(a)	1,14
29 U.S.C. §1132(a)	1,14,15,16
29 U.S.C. §1144a)	1,6

REFERENCE TO REPORT OF OPINIONS

The United States Court of Appeals for the Eleventh Circuit affirmed the trial court's judgment in *First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc.*, 960 F.2d 1546 (11th Cir. 1992), following a non-jury trial in which the trial court ruled in favor of the Defendant, Sunshine-Jr. Food Stores, Inc. ("Sunshine"), on the claims of the Plaintiff, First National Life Insurance Company ("FNL"). *See* A-1a - A-42a.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on May 13, 1992. A timely filed petition for rehearing and a suggestion for *en banc* consideration were denied by the United States Court of Appeals for the Eleventh Circuit on July 30, 1992.

The jurisdiction of this Honorable Court is posited on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The relevant statutory provisions are set out in the appendix hereto as follows:

Authority	Appendix Page
29 U.S.C. § 1109(a)	50a
29 U.S.C. § 1132(a)	51a
29 U.S.C. § 1144(a)	52a

STATEMENT OF THE CASE

Sunshine operates a chain of convenience stores. During the time period at issue in this case, it estab-

lished and funded an employee welfare benefit plan through the purchase of a group life and health insurance policy issued by FNL. The policy was in effect from August 1, 1983, until August 1, 1986, when Sunshine terminated it and obtained coverage from another insurance company.

FNL subsequently filed this action in the United States District Court for the Middle District of Alabama. The complaint asserted a claim for relief under ERISA as well as various state law claims against Sunshine. Federal jurisdiction existed based upon the federal question regarding the ERISA claim (28 U.S.C. § 1331) and diversity of citizenship between the parties (28 U.S.C. § 1332). FNL is an Alabama corporation, Sunshine is a Florida corporation, and the amount in controversy exceeded $50,000.

The policy issued by FNL provided health, medical, and disability coverage to those employees of Sunshine who were eligible to participate in the plan. The terms of the policy obligated Sunshine to enroll at least 75% of its eligible employees in the plan. To be eligible, an employee was required to work for the company for six months, followed by employment for a minimum of 30 hours per week or 1,000 hours per year. Eligible employees who were covered by another health insurance plan were allowed to opt out of coverage under the plan. To participate, the employee paid one-half of the insurance premium and Sunshine paid the other half. Sunshine bore the responsibility of enrolling all eligible employees who opted to participate.

Although the policy did not expressly delineate the details of the welfare benefit plan administration, the parties followed a relatively well-defined allocation of administrative responsibilities. For every billing period,

Sunshine prepared a computer printout of its currently enrolled employees, calculated and collected the appropriate premiums, and forwarded the printout and a premium check payable to FNL to Frank Ayers ("Ayers"), an insurance broker who assisted Sunshine in procuring the FNL policy. Ayers in turn forwarded the printout and premium check to FNL. The claims process typically called for the employee or his health care provider to submit a claim to Sunshine, which verified the claimant's employment status and forwarded the claim to Ayers. Ayers checked the accuracy of the claim, determined the appropriate rate under the policy, and forwarded the claim to FNL, which in turn issued a benefit check. At one point, FNL authorized Ayers to write benefit checks on FNL's bank account, but that authority was later rescinded.

Shortly after the second renewal of the policy, FNL requested information regarding participation levels from Sunshine; however, Sunshine refused to provide the requested material. Sunshine subsequently chose not to renew its contract with FNL. This lawsuit followed. FNL sought monetary relief under ERISA based on Sunshine's breach of certain terms of the policy, including improper payment of benefits and failure to maintain the requisite employee participation in the plan. FNL raised various state law claims against Sunshine as well, including breach of contract, breach of the duties of due care and good faith, willful and wanton conduct, misrepresentation, and failure to disclose material facts, and requested monetary damages and equitable relief, particularly an accounting.

Sunshine filed a motion for summary judgment, and FNL filed a motion to strike Sunshine's jury demand. The district court found that the benefits provided to

Sunshine's employees constituted an employee welfare benefit plan under ERISA. The district court then determined that ERISA preempted all of FNL's state law claims and granted summary judgment for Sunshine as to those causes of action. See A-43a. The court denied summary judgment as to the cause of action stated under ERISA and granted FNL's motion to strike jury demand. After a non-jury trial, the district court found in favor of Sunshine on FNL's ERISA claim and denied all relief requested. See A-24a. Sunshine then requested an award of attorneys' fees, which was denied.

FNL perfected a timely appeal to the United States Court of Appeals for the Eleventh Circuit on the issues of preemption, monetary and equitable relief under ERISA, the agency of Frank Ayers, and other issues not raised in this petition. Sunshine cross-appealed the denial of attorneys' fees. Jurisdiction in the Eleventh Circuit was posited on 28 U.S.C. § 1291. The Eleventh Circuit affirmed the district court on all issues. See A-6a.

ARGUMENT

FNL respectfully submits that the panel decision of the Eleventh Circuit in this case is contrary to or inconsistent with decisions rendered by this Honorable Court regarding preemption of state law claims by ERISA and the availability of monetary awards pursuant to ERISA, and that the precise questions here presented have not been, but should be, finally settled by this Court. FNL further represents to this Court that the questions presented by this petition have generated widely divergent opinions among the circuit courts of appeal and within some circuits. State

supreme courts are also divided in answering these questions. FNL therefore requests this Honorable Court to grant its petition for writ of certiorari and to once again enter the "thicket" of ERISA preemption in an effort to resolve the many existing differences of opinion relating to it. *See Gonzales v. Prudential Ins. Co. of America*, 901 F.2d 446, 451-52 (5th Cir. 1990).

A. ERISA Preemption

In the cases examined to date regarding preemption, this Court has often found state law causes of action preempted by ERISA. *See, e.g., FMC Corp. v. Holliday*, 498 U.S. 52, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990) (law that provided no right of subrogation in motor vehicle accident from claimant's recovery from benefit plan); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990) (state law claim that employee was discharged to prevent vesting of pension benefits); *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988) (law specifically exempting ERISA-covered benefits from generally applicable garnishment law); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (common law tort and contract actions asserting improper processing of a claim for benefits under ERISA benefit program); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983) (law forbidding discrimination in employee benefit programs on the basis of pregnancy); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S. Ct. 1895, 68 L. Ed. 2d 402 (1981) (law prohibiting offsets of worker compensation payments against pension benefits). The Court's decisions have recognized, however, that cer-

tain limitations to ERISA's preemption clause apply. A state law normally is not preempted if the statute does not require the establishment or maintenance of an ongoing plan or makes no reference to a plan. *See Mackey*, 486 U.S. at 841, 108 S. Ct. at 2192-93, 100 L. Ed. 2d at 851; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12, 107 S. Ct. 2211, 2217-18, 96 L. Ed. 2d 1, 11-12 (1987). This Court has also held that state laws which create no potential for conflict with a federal statute, *Fort Halifax*, 482 U.S. at 6, 96 L. Ed. 2d at 8, and lawsuits against ERISA involving run-of-the-mill state law claims, *Mackey*, 486 U.S. at 833 & n.8, 108 S. Ct. at 2187 & n.8, 100 L. Ed. 2d at 846 & n.8, are not preempted. From these rulings, lower courts have taken many divergent paths.

FNL contends that its claims should not be preempted because they do not relate to the employee welfare benefit plan established in this case, because its claims are consistent with the purposes behind ERISA and its preemption provision, and because no adequate remedy is provided by ERISA. Although the Eleventh Circuit rejected FNL's position, other circuits have decided these issues differently.

1. Relation to Employee Benefit Plan

Section 514(a) of ERISA (29 U.S.C. § 1144(a)) provides that if a state law "relates to" an employee benefit plan, it is preempted. A law relates to an employee benefit plan "if it has a connection with or reference to such a plan." *Shaw*, 463 U.S. at 97, 77 L. Ed. 2d at 501. This Court has recognized, however, that relation to an ERISA plan does have limits. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."

Id., 463 U.S. at 100 n.21, 103 S. Ct. at 2901 n.21, 77 L. Ed. 2d at 503 n.21. *See, e.g., Retirement Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1281 (9th Cir. 1990) (ERISA does not preempt state income tax levy); *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 147 (2d Cir.), *cert. denied*, 493 U.S. 811, 110 S. Ct. 57, 107 L. Ed. 2d 25 (1989) (ERISA does not preempt state escheat law); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 556 (6th Cir. 1987) (ERISA does not preempt municipal income tax of general applicability); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1470 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 107 S. Ct. 884, 93 L. Ed. 2d 837 (1987) (ERISA does not preempt state law breach of fiduciary duty claims); *Rebaldo v. Cuomo*, 749 F.2d 133, 139 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008, 105 S. Ct. 2702, 86 L. Ed. 2d 718 (1985) (ERISA does not preempt state law regulating hospital fees). In discussing the connection required for a law to relate to an employee benefit plan, the Second Circuit found that such a connection exists when state law "prescribes either the type and amount of an employer's contributions to a plan, the rules and regulations under which the plan operates, or the nature and amount of the benefits provided thereunder." *General Elec. Co. v. New York State Dept. of Labor*, 891 F.2d 25, 29 (2d Cir. 1989), *cert. denied*, 496 U.S. 912, 110 S. Ct. 2603, 110 L.Ed. 2d 283 (1990) (citations omitted). The Fifth Circuit has held that claims which are peripherally connected to the concerns addressed by ERISA are not preempted, *Hartle v. Packard Elec.*, 877 F.2d 354, 356 (5th Cir. 1989), and that state law claims which do not affect the relations among the principal ERISA entities are not preempted, *Perkins v. Time*

Ins. Co., 898 F.2d 470, 473 (5th Cir. 1990). "What triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefit plans . . . ." *Borges*, 869 F.2d at 146.

2. Purposes of ERISA and Its Preemption Provision

The preemption of state laws was designed to promote consistency and uniformity in regulations governing fiduciary responsibilities and procedures for processing claims and paying benefits. *Memorial Hosp. System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 245 (5th Cir. 1990). ERISA's civil enforcement provisions represent a balancing of the need for prompt and fair claims settlement procedures versus the public interest in encouraging the formation of employee benefit plans. *Pilot Life*, 481 U.S. at 54, 107 S. Ct. at 1556, 95 L. Ed. 2d at 52. The underlying purpose of ERISA is to protect employees and beneficiaries in employee benefit plans. *Nachwalter v. Christie*, 805 F.2d 956, 960-61 (11th Cir. 1986). The purposes of ERISA do not require or suggest that claims should be preempted in cases where such claims would in no way impair the effectiveness of ERISA plans. FNL's claims involve a contract between it and Sunshine which happens to be an insurance contract that forms the basis of an employee benefit plan. Nothing about FNL's claims in the instant case could be construed to adversely affect employees and beneficiaries in the plan. When a state law "does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the [law] has some economic impact on the plan does not require that the [law] be invalidated." *Hospice of Metro Denver Inc. v. Group Health*

Ins. of Oklahoma, Inc., 944 F.2d 752, 754 (10th Cir. 1991) (quoting *Rebaldo*, 749 F.2d at 139).

Application of traditional contract defense in ERISA actions is not unprecedented. *Nash v. Trustees of Boston University*, 946 F.2d 960, 966 (1st Cir. 1991) (holding that claim for fraud in the inducement was not preempted). "The legislative purpose and public policy activating ERISA would be advanced by accommodating the affirmative defense of fraud in the inducement within the developing reserve of federal common law." *Id.* at 965. *See also Krause v. Dresser Industries, Inc.*, 910 F.2d 674, 680 (10th Cir. 1990) (ERISA does not preempt breach of contract claim solely for lost salary); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989) (state law claims for breach of contract, promissory estoppel, and negligent misrepresentation are not preempted where claims do not question eligibility for plan benefits); *Rockney v. Blohorn*, 877 F.2d 637 (8th Cir. 1989) (claim that corporate officers are personally liable under terms of a pension plan covered by ERISA is a contract action, and appropriate state contract law should apply); *Hartle*, 877 F.2d at 356 (ERISA does not preempt contract action on theory of tenured employment not seeking plan benefits); *HealthAmerica v. Menton*, 551 So. 2d 235 (Ala. 1989) (ERISA does not preempt claim for fraudulent inducement); *Teper v. Park West Galleries, Inc.*, 431 Mich. 202, 427 N.W. 2d 535 (1988) (employee's claim for breach of employment contract, including claim for future pension benefits, not preempted by ERISA).

3. Availability of Adequate Remedy

A number of courts have foreclosed the availability of any remedy to plaintiffs whose state law claims have been preempted by ERISA by following a restrictive

interpretation of § 502(a) of ERISA (29 U.S.C. § 1132(a)). *See, e.g., First Nat'l Life*, 960 F.2d at 1550 (argument that ERISA provides inadequate remedy is insufficient reason to overcome language of statute); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 11 (2d Cir. 1992) (preclusion of remedy does not bar ERISA preemption); *Cromwell v. Equicor-Equitable HCA* Corp., 944 F.2d 1272, 1276 (6th Cir. 1991), *cert. dismissed*, ___ U.S. ___ , ___ S. Ct. ___ ,120 L.Ed. 2d 931, 192 U.S. Lexis 4763 (1992) and *cert. denied*, 15 Employee Benefits Cas. (BNA) 2056 (1992) (unavailability of remedy irrelevant to analysis of scope of federal preemption); *Lee v. E. I. DuPont de Nemours and Co.*, 894 F.2d 755, 757 (5th Cir. 1990) (ERISA preempts state law claims of fraud and misrepresentation regardless of whether ERISA provided any remedy for claimed wrong); *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989), *cert. denied*, ___ U.S. ___ , 111 S. Ct. 579, 112 L. Ed. 2d 584 (1990) (availability of a federal remedy is not a prerequisite for federal preemption); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S. Ct. 1893, 95 L. Ed. 2d 500 (1987) (a "gap" in the law does not undermine the reasoning on which a finding of preemption is based). *But see Cromwell*, 944 F.2d at 1286 (Jones, J., dissenting) (prior caselaw in circuit recognized that availability of remedy was relevant factor to consider in determining preemption); *Provident Life & Acc. Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir.), *cert. denied*, ___ U.S. ___ , 111 S. Ct. 512, 112 L. Ed. 2d 524 (1990) (court created federal common law rule of unjust enrichment to recover funds advanced to plan participant); *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157, 162 (6th Cir. 1989), *cert. denied*, 493 U.S. 1093, 110 S. Ct. 1166, 107 L. Ed. 2d 1068 (1990) (preemption

should apply to state law claim only if Congress has created a remedy for the wrong suffered).

4. Conclusion

Consistency and uniformity in opinions among the various circuits has been impossible to maintain in the area of ERISA preemption. Even within circuits, holdings vary greatly from panel to panel and judge to judge. For example, the Eleventh Circuit has generally taken a strict approach to ERISA preemption. *See, e.g., National Cos. Health Benefit Plan v. St. Joseph's Hosp.*, 929 F.2d 1558 (11th Cir. 1991) (ERISA preempts all state common law claims relating to employee benefit plans, including equitable estoppel claims); *Williams v. Wright*, 927 F.2d 1540 (11th Cir. 1991) (contract claims with regard to monetary payments and insurance benefits under retirement contract preempted); *Mullenix v. Aetna Life & Cas. Ins. Co.*, 912 F.2d 1406 (11th Cir. 1990) (cause of action based on Alabama statute regarding chiropractic services preempted); *Farlow v. Union Cen. Life Ins. Co.*, 874 F.2d 791 (11th Cir. 1989) (claim for fraud in the inducement preempted); *Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430 (11th Cir.), *cert. denied*, 493 U.S. 855, 110 S. Ct. 158, 107 L. Ed. 2d 116 (1989) (common law causes of action for bad faith refusal to pay benefits, fraud, and breach of contract held preempted); *Anschultz v. Connecticut General Life Ins. Co.*, 850 F.2d 1467 (11th Cir. 1988) (state law providing civil penalties against insurers who did not promptly settle claims or attempt to settle claims in good faith held preempted); *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987) (gap in the law legitimate if it is result intended by Congress). *But see Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1243

(11th Cir. 1989), in which the court held that the "mere existence of pendent jurisdiction does not automatically qualify the state claim as 'related' to the ERISA claim by virtue of the common factual setting." The court recognized that even though ERISA preemption must be given a broad construction, there are limits. "ERISA's preemption . . . [provision] surely does not extend to every state law claim that, however remotely, factually involves an employee benefit plan." *Id.* at 1243 (quoting *Giardiello v. Balboa Ins. Co.*, 837 F.2d 1566, 1571 n.8 (11th Cir. 1988)) (ellipsis in *Clark*). *See also Sanson v. General Motors Corp.*, 966 F.2d 618, 623 (11th Cir. 1992) (Birch, J., dissenting) ("this case represents the point at which the preemption tide should be stayed"). In *Sanson*, Judge Birch discussed the limits to ERISA's preemption clause as they related to a cause of action for fraud. "To preempt a cause of action, it is not enough that the particular facts of a plaintiff's claim happen to fortuitously involve a pension plan." *Id.* at 624. Judge Birch's dissent also noted that the plaintiff in *Sanson* had no effective parallel ERISA cause of action, and that the policy served by ERISA's preemptive force (requiring plaintiffs to assert federal causes of action to ensure uniform pension law) was absent in the case. Other circuits have similar disparate opinions. *See, e.g., General Elec.*, 891 F.2d at 25 (holding state law governing labor costs preempted by ERISA); *Id.* at 31 (Pratt, J., dissenting) (majority opinion departs from prior decisions); *Borges*, 869 F.2d at 148-49 (state escheat statute not preempted) [Second Circuit]; *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir.), *cert. denied*, 1992 U.S. Lexis 5637, 61 U.S.L.W. 3256 (1992) (claims for fraudulently induced retirement and wrongful termination preempted); *Memorial Hosp.*, 904 F.2d at 249-

50 (state law claims for negligent misrepresentation not preempted) [Fifth Circuit]; *Cromwell*, 944 F.2d at 1276 (breach of contract, promissory estoppel, misrepresentation, and breach of good faith claims preempted); *Id.* at 1283 (Jones, J., dissenting) (state law causes of action do not relate to benefit plan and are not preempted); *P*I*E*, 872 F.2d at 162 (fraud, promissory estoppel, and misrepresentation claims not preempted) [Sixth Circuit].

The circuit courts recognize the divergent opinions that have been issued in recent years on the subject of ERISA preemption, and many judges have expressed dissatisfaction with the current state of preemption law. *See, e.g., Sanson*, 966 F. 2d at 625 (Birch, J., dissenting) ("obviously the Supreme Court needs to do some serious bushhogging in the ERISA preemption thicket"); *Cromwell*, 944 F.2d at 1286 (Jones, J., dissenting) ("the courts have become consumed in a fervor of preemption, sometimes avoiding admittedly difficult and complex analysis, by simply presuming preemption to apply"); *Pitrat v. Garlikov*, 947 F.2d 419, 432 (9th Cir. 1991) (Sneed, J., dissenting) ("while ERISA preemption is easy to invoke and may marginally simplify the law, it does not always result in the best resolution of state and federal interests that present day federalism requires").

FNL respectfully contends that this Honorable Court should grant this petition for writ of certiorari and review the Eleventh Circuit's holding that FNL's state law claims are preempted by ERISA. The grounds hereinabove stated are more than ample to justify such action under Supreme Court Rule 10.1.

B. Monetary Relief Under ERISA

In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985), this Court determined that § 409(a) of ERISA (29 U.S.C. § 1109(a)) did not authorize an award of punitive damages to a beneficiary as a result of a breach of fiduciary duty. The Court has not yet decided, however, whether extra-contractual damages can be recovered under § 502(a)(3) of ERISA (29 U.S.C. § 1132(a)(3)). The *Russell* majority noted in dictum that § 502 does not mention the recovery of extra-contractual damages. 473 U.S. at 144, 87 L. Ed. 2d at 105. The dissent concluded that the statutory language "other appropriate equitable relief" authorizes the recovery of extra-contractual damages. *Russell*, 473 U.S. at 148-58, 105 S. Ct. at 3094-99, 87 L. Ed. 2d at 107-13 (Brennan, J., dissenting).

The circuit courts of appeal have also travelled divergent paths as to this issue. Most hold that punitive damages are not permitted for claims brought pursuant to § 502(a)(3). *See, e.g., Bishop v. Osborn Transp., Inc.*, 838 F.2d 1173 (11th Cir.), *cert. denied*, 488 U.S. 832, 109 S. Ct. 90, 102 L. Ed. 2d 66 (1988); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Sommers Drug Stores*, 793 F.2d at 1456; *Powell v. Chesapeake & Potomac Tel. Co. of Virginia*, 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170, 106 S. Ct. 2892, 90 L. Ed. 2d 980 (1986). Several circuit courts have also held that "extra-contractual" compensatory damages are not recoverable under § 502(a)(3). *See, e.g., United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096, 109 S. Ct. 1568, 103 L. Ed. 2d 935 (1989); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821

(1st Cir. 1988); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986). *But see Warren v. Society Nat'l Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2256, 114 L.Ed. 2d 709 (1991) (holding that monetary relief is available under ERISA if necessary to secure complete relief). *See also First Nat'l Life*, 960 F.2d at 1554 (Clark, J., specially concurring).

FNL submits that the *Warren* approach is the better reasoned and should be adopted by this Honorable Court. Extracontractual damages do not necessarily have to be labelled as "compensatory" or "punitive." Equitable relief may include monetary damages if necessary to do complete justice. *Walters v. Marathon Oil Co.*, 642 F.2d 1098 (7th Cir. 1981). In this case, FNL is entitled to monetary relief under § 502(a)(3) of ERISA for its contractually-related damages.[1]

The Eleventh Circuit relied on *Russell*, 473 U.S. at 134, 105 S. Ct. at 3085, 87 L. Ed. 2d at 96, and *Osborn Transp.*, 838 F.2d at 1173, in holding in this case that relief under ERISA is limited to that which

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[1] The Eleventh Circuit held that it would not reverse the district court's finding that FNL had not adequately proved *some* of the damages it asserted, because the finding was one of fact that could only be reversed if clearly erroneous. *First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc.*, 960 F.2d 1546, 1551-52 (11th Cir. 1992). While FNL contested that finding on appeal in the Eleventh Circuit and still contends that it adequately proved all of its damage claims, the affirmance of the finding proved to be mere dictum in view of the fact that other damages were clearly proven, and that the court of appeals, as well as the district court, also held that no monetary damages whatsoever were available under the pertinent ERISA provisions.

If the case is remanded either for a trial on the state law claims or for a determination of monetary relief under ERISA, the question of damages would presumably be addressed anew.

is equitable in nature. The Eleventh Circuit opinion does not mention, however, this Court's opinion in *Ingersoll-Rand*, wherein the Court concluded that there was "no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits.' It is clear that the [monetary] relief requested here is well within the power of federal courts to provide." 498 U.S. at ___, 112 L. Ed. 2d at 488.

FNL still maintains that it is entitled to the equitable relief of an accounting. If such relief is ordered, then monetary relief is clearly awardable as an incident to that equitable relief. *Chauffeurs, Teamsters and Helpers v. Terry*, 494 U.S. 558, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990); *Warren*, 905 F.2d at 982. Contrary to the Eleventh Circuit panel's opinion, an accounting is appropriate in this case because the accounts were mutual and complicated, if for no other reason. *See Worley v. Worley*, 388 So. 2d 502 (Ala. 1980); *Wooten v. Wooten*, 270 Ala. 191, 117 So. 2d 192 (1959).[2] FNL clearly relied upon Sunshine to fairly report the status of its employee workforce in order for FNL to determine its rights under the agreement between the parties. Only Sunshine could perform this function, because FNL had no access to the needed information except through Sunshine, and Sunshine did not respond to FNL's requests for information which would assist in making that determination. FNL had no way of knowing whether Sunshine was maintaining the proper participation levels required under the pol-

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[2] FNL's inability to obtain an accounting complicated its efforts to prove damages in this case. Since FNL was denied both an accounting and meaningful access to Sunshine's information, the only means available to FNL in proving its case was the expanded statistical analysis.

icy, as Sunshine alone maintained information as to eligibility and participation levels. Had an accounting been ordered, then FNL submits that payment of amounts due to FNL under the contract with Sunshine could have been ordered as a part of the total relief due to FNL.

FNL respectfully contends that this Honorable Court should grant this petition for writ of certiorari and review the Eleventh Circuit's holding that monetary relief is not available to FNL under ERISA. The grounds hereinabove stated are more than ample to justify such action under Supreme Court Rule 10.1.

C. Fiduciary Duty Owed By Sunshine to FNL

This Court has emphasized that ERISA's fiduciary requirements codify and make applicable to ERISA fiduciaries certain principles developed in the area of trust law. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989). When trust law principles are applied, it is clear that Sunshine was not only a fiduciary with respect to the employee welfare benefit plan established in this case, but it was also a fiduciary with respect to FNL. Sunshine placed itself in a position of trust and confidence in relation to FNL by its exclusive access to employee records, and thus owed a duty to FNL to properly disclose information and account to FNL. The fact that Sunshine played different roles simultaneously should not alter this conclusion. A company acts as a fiduciary in administering a welfare plan in accordance with its terms. *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988). Certainly the fiduciary responsibility for doing so protects the plan and its beneficiaries, as the Eleventh Circuit panel noted in this case. *First Nat'l Life*, 960 F.2d at 1550. But for as long

as the contract existed between Sunshine and FNL, Sunshine also had fiduciary responsibility to FNL in the administration of this benefit plan according to its terms.

"A fiduciary is an agent who is required to treat his principal with utmost loyalty and care—treat him, indeed, as if the principal were himself." *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 128-29 (7th Cir. 1992). In *Brasher v. First Nat'l Bank of Birmingham*, 232 Ala. 340, 344, 168 So. 42 (1936), the Alabama Supreme Court stated that where a relationship of trust and confidence exists between two parties, the party in whom the confidence is reposed has a duty to make full disclosure of all material facts within its knowledge relating to the matter in question, and any concealment of material facts is a fraud. FNL submits that the Eleventh Circuit disregarded established general principles of trust law in finding that Sunshine could not be held accountable to it as a fiduciary. Once established, then Alabama law provides that in a relationship which "afford[s] the power and means to one party to a transaction to take undue advantage of the other party," redress will be given to such other party if "there is found the slightest trace of undue influence or unfair advantage." *Brasher*, 232 Ala. at 344-45. Sunshine stood in a fiduciary relationship with FNL, and therefore, FNL should be entitled to an accounting and the damages resulting from Sunshine's breach of its fiduciary duty.

D. Dual Agency

FNL's entitlement to some of the relief sought in this case depends in part upon the status of Ayers as Sunshine's agent. The Eleventh Circuit's affirmance of the district court's finding that Ayers was the agent

of FNL but not of Sunshine fails to take into account FNL's contention that Ayers was the agent of both. *First Nat'l Life*, 960 F.2d at 1552. Such dual agency cannot be disputed, as Ayers himself characterized himself as the agent of both Sunshine and FNL. The agency relationship between Ayers and Sunshine was formed in the State of Florida. Under Florida law, "[w]hen a broker agrees to obtain insurance for a client, the broker becomes the client's agent. As agent, the broker owes his client a duty of care and a duty to exercise the skill he holds himself out as having." *Nu-Air Mfg. Co. v. Frank B. Hall & Co. of New York*, 822 F.2d 987, 997 (11th Cir. 1987) (citations omitted).

The law is clearly settled that an agent can be employed by two principals contemporaneously. *Sea Calm Shipping Co., S.A. v. Cooks*, 565 So. 2d 212 (Ala. 1990). Furthermore, an agent owes his principal a fiduciary duty and must act in the utmost good faith and make known to his principal all material facts that affect the subject matter of the agency. *Bay Shore Properties Inc. v. Drew Corp.*, 565 So. 2d 32 (Ala. 1990). When acting for two principals, the agent owes such fiduciary duty and good faith to both. In this case, Ayers acted for Sunshine to the detriment of FNL, thereby contributing to the damages suffered by FNL. A principal is liable for the acts of its agent performed in the interest of and in fulfillment of the principal's business so long as the agent is acting within the scope of his employment. *Cordes v. Wooten*, 476 So. 2d 89 (Ala. 1985). Sunshine should be liable for FNL's damages resulting from Ayers' actions.

CONCLUSION

FNL requests this Honorable Court to grant its petition for writ of certiorari for the following reasons:

(1) The opinion of the United States Court of Appeals for the Eleventh Circuit in this case is contrary to or inconsistent with decisions rendered by this Court.

(2) The questions presented herein have generated widely divergent opinions among the circuit courts of appeal and state supreme courts, causing confusion and inconsistency in the law.

(3) The questions presented herein have not been, but should be, settled by this Court.

Respectfully submitted,

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APPENDIX
TABLE OF CONTENTS

	Page
Order of United States Court of Appeals for the Eleventh Circuit denying petition for rehearing and suggestion for rehearing *en banc*	1a
Judgment of United States Court of Appeals for the Eleventh Circuit	3a
Opinion of United States Court of Appeals for the Eleventh Circuit	6a
Judgment of United States District Court for the Middle District of Alabama, Northern Division	22a
Memorandum Opinion of United States District Court for the Middle District of Alabama, Northern Division	24a
Order of United States District Court for the Middle District of Alabama, Northern Division	43a
29 U.S.C. Section 1109(a)	50a
29 U.S.C. Section 1132(a)	51a
29 U.S.C. Section 1144(a)	52a

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7535 & 90-7668

FIRST NATIONAL LIFE INSURANCE COMPANY,
an Alabama Corporation,
Plaintiff-Appellant,

versus

SUNSHINE JR. STORES, INC.,
a Florida Corporation,
Defendant-Appellee.

FIRST NATIONAL LIFE INSURANCE COMPANY,
an Alabama Corporation,
Plaintiff-Appellee,

versus

SUNSHINE JR. STORES, INC.,
a Florida Corporation,
Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Alabama

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL 30 1992
MIGUEL J. CORTEZ
CLERK

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before:

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson, III

UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7535

D.C. Docket No. 88-T-575-N

FIRST NATIONAL LIFE INSURANCE COMPANY,
an Alabama Corporation,
Plaintiff-Appellant,

versus

SUNSHINE-JR. STORES, INC.,
A Florida Corporation,
Defendant-Appellee.

90-7668

D.C. Docket No. 88-T-575-N

FIRST NATIONAL LIFE INSURANCE COMPANY,
an Alabama Corporation,
Plaintiff-Appellee,

versus

SUNSHINE-JR. STORES, INC.,
a Florida Corporation,
Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Alabama

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 13 1992
MIGUEL J. CORTEZ
CLERK

Before ANDERSON, Circuit Judge, CLARK*, Senior Circuit Judge, and BROWN**, Senior District Judge.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Wesley E. Brown, Senior U.S. District Judge for the District of Kansas, sitting by designation.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

CLARK, Senior Circuit Judge, specially concurred and filed an opinion.

Entered: May 13, 1992
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabe
Deputy Clerk

ISSUED AS MANDATE: August 10, 1992

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

Nos. 90-7535, 90-7668.

FIRST NATIONAL LIFE INSURANCE COMPANY,
an Alabama Corporation,
Plaintiff-Appellant,

v.

SUNSHINE-JR. FOOD STORES, INC.,
a Florida Corporation,
Defendant-Appellee,

FIRST NATIONAL LIFE INSURANCE COMPANY,
an Alabama Corporation,
Plaintiff-Appellee,

v.

SUNSHINE-JR. FOOD STORES, INC.,
a Florida Corporation,
Defendant-Appellant.

May 13, 1992.

Insurer under life and health policy used to provide funding for employee benefits program sued insured employer, claiming breach of contract, under both Alabama state law and ERISA. The United States District Court for the Middle District of Alabama, No. 88-T-575-N, Myron H. Thompson, Chief Judge, entered judgment for insured employer, and appeal was taken. The Court of Appeals, Wesley E. Brown, Senior District Judge, sitting by designation, held that: (1) ERISA preempted state law causes of action; (2) employer was not "fiduciary" of insurer under ERISA, in connection with its claims processing activity; and (3) employer was not entitled to attorney fees.

Affirmed.

Clark, Senior Circuit Judge, concurred specially and filed opinion.

* * * *

Appeals from the United States District Court for the Middle District of Alabama.

Before ANDERSON, Circuit Judge, CLARK*, Senior Circuit Judge, and BROWN**, Senior District Judge.

WESLEY E. BROWN, Senior District Judge:

This suit concerns a group life and health insurance policy issued by First National Life Insurance Company ("FNL"). The policy was used to fund an employee welfare benefit plan established by Sunshine-Jr. Food Stores, Inc. ("Sunshine") to provide health benefits to its employees. The policy was in effect from August 1, 1983, until August 1, 1986. On this latter date, Sunshine terminated its policy with FNL and obtained coverage from another insurer. FNL subsequently filed this action asserting various state claims against Sunshine, including breach of contract and misrepresentation, as well as a claim for relief under the Employee Retirement Income Security Act, ("ERISA") 29 U.S.C. § 1001, et seq. The district court held that all of the state law claims asserted by FNL were preempted by ERISA. The ERISA claims were tried to the court. After hearing the evidence, the district court determined that FNL was not entitled to relief and entered judgment in favor of Sunshine. FNL appeals, raising several grounds for error.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Wesley E. Brown, Senior U.S. District Judge for the District of Kansas, sitting by designation.

Facts

Sunshine operates a chain of convenience stores. During the time period at issue here, Sunshine had about 2,000 employees. The company provided group health benefits to its employees through a fully insured plan. Eligible employees who wished to participate in the plan paid one-half of the premium for insurance benefits and Sunshine paid the other half. Prior to August of 1983, Sunshine provided benefits through a group policy with Aetna Insurance Company. In 1983, Sunshine began looking for another insurance carrier because of Aetna's rising premiums. The company contacted Frank Ayers, an insurance broker in Tallahassee, Florida. With Ayers' aid, Sunshine eventually chose FNL as insurer for its plan. The new group policy between these parties took effect on August 1, 1983.

Under the policy, FNL provided health, medical, and disability coverage to all employees of Sunshine who worked a minimum of 30 hours a week or a minimum of 1,000 hours each year. Sunshine bore the responsibility of enrolling all employees who were eligible to participate and wished to do so. The policy provided that Sunshine would enroll at least seventy-five percent of its eligible employees in the plan.

The policy did not expressly set forth the details of how the plan was to be administered. Nevertheless, the parties followed a relatively well-defined allocation of administrative responsibilities. For every billing period, Sunshine prepared a computer printout of its currently enrolled employees, calculated and collected the appropriate premiums, and forwarded a premium check along with the printout to Frank Ayers. Ayers and his employees in turn copied the printout and forwarded the materials to FNL. FNL deposited the premium check into its general assets accounts.

As to the claims process, employees or their health care providers typically submitted claims to Sunshine. The company would verify the employment status of the claimants and forward the claims to Ayers. Ayers would then check the accuracy of the claim and determine the appropriate rate under the policy. During the first year the policy was in effect, Ayers would send the claim to FNL, which would then issue a benefit check. In the later two years of the policy, FNL authorized Ayers to write benefit checks on its bank account. Ayers received a six percent commission from FNL on the Sunshine policy.

Sunshine ended its relationship with FNL in August of 1986, on the third anniversary of the policy. Again with Ayers' assistance, the company found a new insurer for its employee benefit plan. FNL later filed this suit. In addition to the claims asserted under state law, appellant sought monetary relief under ERISA based upon alleged breaches of the policy by Sunshine. The alleged breaches included the improper payment of benefits and the failure to maintain seventy-five percent employee participation in the plan.

Issues on Appeal

a. *Preemption*

The first issue raised by appellant FNL is whether the district court erred in finding that all of FNL's state law claims were preempted by ERISA. In its amended complaint, FNL alleged claims against Sunshine for breach of contract, breach of the duties of due care and good faith, willful and wanton conduct, misrepresentation, and an action under the Alabama Code for failure to disclose material facts. FNL apparently contends that these state claims should not be preempted because they do not "relate to" an employee benefit plan and are therefore outside the scope of ERISA's preemption clause. Appellant also suggests that the state law claims do not create a conflict

with the purpose of the preemption provision. Finally, appellant argues that preemption is inappropriate because FNL has no adequate remedy under ERISA for the wrongs allegedly committed by the appellee.

We note initially that appellant does not challenge the district court's finding that the policy was part of an employee welfare benefit plan covered by ERISA. *See* 29 U.S.C. § 1002. *See also Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982) (*en banc*). The district court found that the ERISA plan incorporated the terms of the group policy. R3-78-7. And, although Sunshine apparently had no formal written plan, the district court determined what the terms of the plan were at least in part from the course of dealing between FNL and Sunshine.

"In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 95, 103 S.Ct. 2890, 2898, 77 L.Ed.2d 490 (1983). Under ERISA, Congress' intent is set forth expressly in the statutory language, which generally preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). The preemption provision is "deliberately expansive and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 46, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987). The Supreme Court has consistently recognized the expansive sweep of the preemption clause. *Id.*

In *Amos v. Blue Cross-Blue Shield of Alabama,* 868 F.2d 430 (11th Cir.), *cert. denied,* 493 U.S. 855, 110 S.Ct. 158, 107 L.Ed.2d 116 (1989), this court addressed the question of whether certain state law claims arising out of an alleged wrongful denial of benefits under an employee welfare plan were preempted by § 1144(a). The plaintiff in *Amos* asserted common law causes of action for bad faith

refusal to pay benefits, fraud, and breach of contract. We concluded that the claims were preempted, stating "there can be no dispute that the common law causes of action asserted by the plaintiffs . . . 'relate to' an employee benefit plan and therefore fall within ERISA's express preemption clause." *Id.* at 431. *See also Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1469-70 (11th Cir. 1986).

In the instant case, FNL seeks damages based on Sunshine's alleged mishandling of benefit payments and its alleged failure to adhere to terms of the group policy which were incorporated into the welfare benefit plan. We must reject the argument that these claims do not "relate to" the employee benefit plan. Congress used the words "relates to" in their broad sense and did not mean to preempt only state laws specifically designed to affect employee benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983). A state law relates to an employee benefit plan if it "has a connection with or reference to such a plan." *Id.* The claims asserted by FNL have an obvious connection with the plan in this case. They are founded upon Sunshine's alleged failure to adhere to its obligations under the group policy which funded Sunshine's welfare benefit plan. *Cf. Amos*, 868 F.2d at 430. The district court found that the plan incorporated the terms of the policy. These claims "relate to" the welfare benefit plan.

Appellant maintains that preemption is not appropriate because its state claims are consistent with the purposes behind ERISA and the preemption provision. FNL argues that preemption of state laws was designed to preserve consistency and to prevent the imposition of conflicting requirements in benefit plans. According to FNL, the maintenance of its claims against Sunshine does not conflict with any of the objectives of ERISA. But the preemption provision displaces all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements. *Mackey v. Lanier Collection*

Agency, 486 U.S. 825, 829, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). Moreover, state contract and tort laws that impose varying standards upon the administrator of a welfare benefit plan create a significant potential for conflict with ERISA and thus are logically preempted. As we noted earlier, Congress deliberately wrote § 1144(a) in a broad manner in order to make pension plan regulation exclusively a federal concern.

Nor is the argument that ERISA provides an inadequate remedy a sufficient reason to overcome the application of § 1144(a). The question of preemption is a matter of congressional intent; it is not a question of which body of law—state or federal—offers more protection to an aggrieved party. *Phillips v. Amoco Oil Co.,* 799 F.2d 1464, 1470 (11th Cir. 1986) ("To argue that Congress created a 'gap' in the law does not undermine the reasoning on which a finding of preemption is based."). The claims asserted here fall within the range of state laws that relate to an employee benefit plan. For these reasons, we find that the district court correctly held that the plaintiff's state law claims were preempted by ERISA.

b. *Relief under ERISA*

FNL's next argument is that the district court erred in refusing to order Sunshine to render an accounting to FNL. FNL believes it is entitled to an accounting to determine if Sunshine complied with the insurance agreement. FNL contends that Sunshine stood in a fiduciary capacity as to FNL and is therefore obligated to render an accounting. Appellant also argues that an accounting is appropriate because the accounts at issue were mutual and complicated.

The district court concluded that although Sunshine was a fiduciary with respect to the plan, it was not a fiduciary with respect to FNL. FNL challenges this finding, contending that Sunshine's exclusive access to employee records rendered it a fiduciary with a duty to account to

FNL. Clearly, the fiduciary duties outlined in ERISA are designed to protect the plan and its beneficiaries rather than those who administer the plan. *See e.g.*, 29 U.S.C. § 1002(21)(A) (defining "fiduciary" with respect to a plan). *See also* §§ 1104 and 1109. Appellant has not pointed to any ERISA provision that would impose a fiduciary duty upon Sunshine with respect to FNL. *Cf. Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139, 105 S.Ct. 3085, 3089, 87 L.Ed.2d 96, 102 (1985) (Under § 1109(a), the relevant fiduciary relationship is one with respect to the plan.) Nor was the relationship between FNL and Sunshine such that Sunshine could be held accountable as a fiduciary. FNL entered into the policy with Sunshine as part of an arm's-length transaction. FNL was free to negotiate such terms as it thought necessary for its protection. It did not enter this transaction dependent on the whim of Sunshine; in fact, FNL drafted the policy that served as the basis of the welfare benefit plan. FNL's claims that it could not examine Sunshine's records are not sufficient to establish a fiduciary duty on the part of Sunshine to make an accounting. Moreover, as the district court noted, Sunshine's records were made available to FNL in the course of this suit. R3-78-21. In light of the fact that FNL had the opportunity to examine the records, it is not clear why it would be entitled to an order directing Sunshine to make an accounting. FNL has shown no circumstances to justify such an order. We find no error in the district court's refusal to order an accounting.

Appellant's next assertion of error relates to its claim for damages arising out of Sunshine's alleged failure to insure the minimum level of participation specified in the policy. Under the FNL policy, Sunshine promised to enroll seventy-five percent of all eligible employees in the plan. FNL argued that Sunshine's alleged failure to meet this requirement resulted in lost profits of approximately $234,000. The district court, after hearing the evidence, denied relief on this claim for two reasons. First, the court

concluded that the contract between the parties specified that the only remedy for a breach of this duty was for FNL to terminate the policy. Second, the court found that FNL failed to prove any damages from the alleged breach. FNL disputes both of these findings. We need not address the first finding by the district court because we conclude that the second finding is dispositive of appellant's allegation of error on its "seventy-five percent" claim.

Appellant's calculation of lost profits was based on an assumption that if additional Sunshine employees had been enrolled in the plan, the claims asserted by those employees would have amounted to seventy-five percent of the additional premiums that would have been generated. The district court found FNL's estimate was "entirely too speculative a basis on which to award relief." R3-78-14. The court observed that FNL "did not support its assertion that it would have enjoyed a 75% ratio of claims to premium income with any persuasive evidence" and characterized FNL's profit estimates as "implausibly rosy." *Id.* By way of argument, FNL asserts the familiar rule that lost profits should not be denied simply because the amount of damages is difficult to ascertain. This rule is most often invoked when the difficulty in determining the amount of damages is a result of the defendant's wrongdoing. *See e.g., Anderson v. Mt. Clemens Pottery Company,* 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). The rule is of no benefit, however, where the complaining party fails to prove that the defendant's conduct caused some injury. *Id.* at 688, 66 S.Ct. at 1192. In the instant case, the district court found that FNL "did not prove that this alleged violation of the plan caused it any harm." R3-78-13. This finding is a determination of fact that we will reverse only if it is clearly erroneous. Fed.R.Civ.P. 52(a). In this instance the district court was not clearly erroneous. There was evidence presented from which the court could have reasonably concluded that increased participation by Sunshine employees would not have resulted in any profit to

FNL. The court may have found persuasive the evidence suggesting that FNL's group policies were operating at a loss. Sunshine introduced evidence tending to show that FNL's average loss ratio on group policies was much higher than FNL estimated—high enough that FNL might have lost money on such groups. The court noted that the years covered by this suit were considered peak bad years for health care insurers and that FNL in large part left the group health insurance field shortly after this incident. In addition, FNL's witnesses acknowledged that they could not state with any reasonable certainty what the loss ratio would have been if the additional Sunshine employees had been enrolled in the plan. Considered as a whole, the record supports the district court's finding. FNL had the burden of demonstrating that it suffered damages from the alleged breach by Sunshine.

c. *Agency*

Part of FNL's claim was that Frank Ayers, an insurance agent, made improper overpayments to beneficiaries of the plan. FNL argued in the district court that Sunshine was liable for these overpayments because Ayers was acting as the agent of Sunshine when he paid the claims. The trial court, however, found that "either Ayers acted independently in processing claims or he acted as First National's agent in this function." R3-78-16. The court further stated that "First National, not Sunshine Jr., monitored and supervised Ayers in processing claims. . . ." *Id.* Appellant believes these findings are erroneous.

As appellant recognizes, the district court's determination of this issue is subject to review under the clearly erroneous standard. We will not reverse "if the district court's account of the evidence is plausible in light of the record viewed in its entirety. . . ." *Anderson v. Bessemer City,* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). In light of this standard we have little trouble affirming the finding of the district court. Evidence was presented

at trial which suggested that Ayers processed claims on behalf of and under the supervision of FNL. *See e.g.*, R.Vol. VII at 230-32. If Ayers had not processed the claims, FNL would have performed that task itself. *Id.* Pursuant to an agreement between Ayers and FNL, Ayers received a six per cent commission from FNL as compensation for his work. FNL authorized Ayers to sign checks on the FNL account to make benefit payments. Taken as a whole, the evidence supports a conclusion that Ayers processed the claims as the agent of FNL. *See* Restatement (Second) of Agency § 1 ("Agency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.").

d. *Benefits paid to ineligible employees*

Appellant also sought damages from Sunshine under 29 U.S.C. § 1132(a)(3) for benefits paid to Sunshine employees who were not eligible under the health insurance plan. Pursuant to the course of dealing between FNL and Sunshine, Sunshine bore the responsibility for verifying the employment status of claimants. FNL alleges that it paid over $40,000 to three claimants who were erroneously certified by Sunshine as eligible employees. FNL asked the court to award it compensatory damages for Sunshine's failure to insure proper certification of these employees. The district court held that even if Sunshine violated the terms of the plan, FNL was not entitled to any damages therefrom because such relief was not equitable in nature and was not authorized by § 1132(a)(3).

Section 1132(a)(3) authorizes a civil action to be brought:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

The scope of the phrase "other appropriate equitable relief" has caused the courts some difficulty. In *Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173 (11th Cir. 1988), we held that a beneficiary could not obtain punitive damages under § 1132(a)(3). In so holding, we relied on the Supreme Court's observation in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 105 S.Ct. 3085, 3092, 87 L.Ed.2d 96, 106 (1985) that:

> the six carefully-integrated civil enforcement provisions found in section [1132] . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'

We also noted that the civil enforcement provisions of § 1132(a) focus heavily on the beneficiary's right to enforce the terms of the plan and do not mention the recovery of extra-contractual damages. *Bishop*, 838 F.2d at 1174. We concluded that punitive damages did not come within the remedies authorized by § 1132(a)(3), stating: "Punitive damages are just that, damages, and are not ordinarily incorporated by the term 'equitable relief.' " *Id. (citing Sokol v. Bernstein*, 803 F.2d 532, 537-38 (9th Cir. 1986)). In *Sokol*, the court declared that "it appears Congress used the word 'equitable' to mean what it usually means—injunctive or declaratory relief." Although this latter declaration may be somewhat over-restrictive, we cannot ignore the fact that the statute limits the relief available to equitable relief. Despite this, FNL has cast its claim as one for legal relief and argues that it is entitled to an award of compensatory damages for breach of the plan's terms. We must reject FNL's argument that the phrase "equitable relief" in § 1132(a)(3) authorizes an award of

compensatory damages.[1] The omission of any mention of a right to legal remedies in § 1132(a)(3) must be taken as an indication of Congress' intent to limit the relief available under this section to that which is equitable in nature. *Cf. Bishop,* 838 F.2d at 1174 (Congress appreciated the distinction between legal and equitable remedies; the restriction of § 1132(a)(3)(B) to equitable relief shows that Congress did not intend to allow the recovery of punitive damages under § 1132(a)).

Restitution is an equitable remedy designed to restore to a plaintiff something of value that is wrongfully in the possession of another. *See* Restatement of Restitution (Second) § 1 ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.") Section 1132(a)(3) undoubtedly authorizes a fiduciary in certain circumstances to bring an action for restitution to recover benefits mistakenly paid out. *See Blue Cross and Blue Shield of Alabama v. Weitz,* 913 F.2d 1544, 1549 (11th Cir. 1990). In *Weitz,* we found that a fiduciary of an ERISA plan could maintain an action for restitution under § 1132(a)(3) against a physician to whom payments were made in violation of the plan.

FNL argued in the district court that it was entitled to an award of restitution from Sunshine. The district court found that restitution was inappropriate, however, because the alleged overpayments did not go to Sunshine but instead went to beneficiaries or to health care providers. The court noted that FNL might have a claim for resti-

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[1] We express no opinion as to whether a party in appellant's position might be entitled to some other relief under § 1132(a)(3) or relief under other ERISA provisions. For example, as Judge Clark points out in his concurring opinion, we do not have before us the issue of an insurance company seeking its premiums. Similarly, we are not called on to decide if ERISA enables a party such as FNL to recover on its own behalf rather than on behalf of a welfare benefit plan. We have addressed only those claims asserted by FNL on appeal.

tution against these third parties, *cf. Weitz, supra,* but concluded that FNL did not have a claim for restitution against Sunshine. Appellant has not argued on appeal that the district court's application of this principle of restitution was incorrect and we find no error in the court's ruling. We therefore affirm the district court's ruling on this issue.

No. 90-7668

In a cross-appeal, Sunshine contends that the district court erred by refusing to award Sunshine attorneys' fees. This issue is governed by 29 U.S.C. § 1132(g)(1), which provides in part: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the cort in its discretion may allow a reasonable attorney's fee and costs of action to either party." Sunshine contends that the district court abused its discretion in denying attorneys' fees because the suit by FNL had no basis under law. The district court specifically found, however, that FNL was not acting in bad faith in bringing the suit and that the lawsuit presented difficult and close questions of law. After weighing all of the factors, the district court determined that an award of fees was not warranted. This scenario does not show an abuse of discretion. The district court considered appropriate factors in determining whether attorney's fees should be assessed and the conclusion reached was well within the broad range of discretion afforded to the trial judge.

Conclusion

The judgment of the district court is AFFIRMED.

CLARK, Senior Circuit Judge, specially concurring:

I concur in the result in this case but am troubled by some inferences in the opinion. This case exemplifies a type of ERISA case we are seeing more often—the entire

plan consists of an insurance policy. I agree with the majority that we have to look to 29 U.S.C. § 1132(a)(3), which is quoted on page 1552 of the opinion. That subsection authorizes the plaintiff insurance company, a fiduciary, to bring a civil action to obtain relief. The majority states on page 2421: "Appellant has not pointed to any ERISA provision that would impose a fiduciary duty upon Sunshine with respect to FNL." Further, on page 2424, the majority states: "We must reject FNL's argument that the phrase 'equitable relief' in § 1132(a)(3) authorizes an award of compensatory damages."

I can find no cases similar to this one, but my study of the statute leads me to conclude that a plaintiff situated as FNL here can collect compensatory damages under certain circumstances. I repeat that I concur in the result in this case because FNL failed to make out a case. Nevertheless, it is my view that an employer who secures a medical insurance policy on its employees becomes a co-fiduciary pursuant to § 1002(21)(A)(i):

> (21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, ... Such term includes any person designated under section 1105(c)(1)(B) of this title.

This conclusion finds support in the definitions of "plan sponsor" and "administrator" in § 1002.

Section 1132(a)(3) permits an insurance company/fiduciary to obtain an accounting from an employer/co-fiduciary that is necessary to allow the insurance company to properly administer the plan. This action would include requiring the employer to furnish the names of all employees, dates of employment, and other data necessary to insure coverage and payment of premiums by the em-

ployer for such coverage. Similarly, I conclude that subpart (ii) of this section—"to enforce any provision of this subchapter of the terms of the plan"—permits the insurance company to bring an action for premiums owed for insurance coverage provided under the plan, even though such relief might not be strictly classified as "equitable."

Any other interpretation of the statute would frustrate the intention of the statute to include medical insurance plans within the provisions of ERISA. Insurance companies would be reluctant to engage in writing such policies if their rights to collect premiums were limited first by an interpretation that ERISA preempts all claims by such companies against employers, and then by an interpretation of ERISA that would limit such claims only to equitable claims and provide relief only for those who are beneficiaries of such plans. I am inclined to agree with the majority that ERISA preempts such an action, but I read § 1132(a)(3) broadly enough to require district courts to enforce all rights an insurance company has against an employer that stem from the policy and the relationship of the parties in administering the plan.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 88-T-575-N

FIRST NATIONAL LIFE INSURANCE COMPANY, as [sic] Alabama Corporation,

Plaintiff,

v.

SUNSHINE JR. STORES, INC., a Florida corporation,

Defendant.

FILED

JUL 5 1990

CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court that judgment be and it is hereby entered in favor of defendant Sunshine Jr. Stores, Inc. and against plaintiff First National Life Insurance Company; and that take nothing by its complaint.

It is the further ORDER of the court that costs be and they are hereby taxed against plaintiff First National Life Insurance Company, for which execution may issue.

DONE, this the 5th day of July, 1990.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

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MEMORANDUM OPINION

In this lawsuit, plaintiff First National Life Insurance Company charges defendant Sunshine Jr. Stores, Inc. with violations of ERISA, the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§ 1001-1461. The charges relate to the roles of these two companies in Sunshine Jr.'s employee group health insurance plan. First National claims that Sunshine Jr. did not meet and maintain the 75% participation level required by the plan; that an agent

of Sunshine Jr. committed numerous errors in processing claims resulting in improper payment of claims by First National; and that Sunshine Jr. improperly enrolled several persons on the plan. First National also asserts an accounting claim. For the reasons which follow, the court finds in favor of Sunshine Jr. as to all claims.

I.

Sunshine Jr. is a corporation which owns and operates a chain of convenience marts in five states in the southeastern portion of the United States. During the period of time encompassing this case, it had approximately 2,000 employees at any given time. The company provided group health benefits to these employees through a fully insured plan.[1] Participating employees essentially purchased a health insurance policy, partially subsidized by their employer. Eligible employees who wished to participate in the plan paid one-half of the premium for these insured benefits and Sunshine Jr. paid the other half. Prior to August 1983, Sunshine Jr. arranged these benefits through a group policy with Aetna Insurance Company. In 1983, because of rising premiums with Aetna, Sunshine Jr. began looking for another insurance carrier for its plan. The company contacted Frank Ayers, an insurance broker in Tallahassee, Florida. With Ayers's aid, Sunshine Jr. eventually replaced Aetna with First National as insurer in its plan. The new group policy between these parties took effect on August 1, 1983.

Under this policy, First National provided health, medical, and disability coverage to all employees of Sunshine Jr. who worked either a minimum of 30 hours a week or a minimum of 1,000 hours each year. Eligibility for ben-

[1] On the different means of structuring employee welfare benefit plans, including fully insured plans and self-insured plans with reinsurance, see *Drexelbrook Engineering Co. v. Travelers Ins. Co.*, 710 F. Supp. 590, 594-98 (E.D. Pa. 1989), *aff'd*, 891 F.2d 280 (3rd Cir. 1989) (table).

efits under this policy did not begin until an employee had worked for the company for six months. Under the plan, Sunshine Jr. bore the responsibility of enrolling all employees who were eligible to participate and wished to do so. The contract directed that the company would enroll at least 75% of its eligible employees on this policy. If a Sunshine Jr. employee was covered by a separate health insurance policy—for example, the employee's spouse's health insurance—then that employee could opt out of coverage under the company's policy. This feature of the plan allowed such employees to avoid double coverage and payment of an additional premium.

The policy did not expressly set out all of the details of administration of the plan. The parties nonetheless followed a relatively well-defined allocation of administrative responsibilities. For every billing period, Sunshine Jr. prepared a computer printout of its currently enrolled employees, calculated and collected the appropriate premiums for this number, and forwarded a premium check along with the printout to Ayers. Ayers and his employees in turn copied the printout and forwarded the materials to First National. First National deposited the premium check into its general asset accounts.

As to the claims process, employees or their health care providers typically submitted claims to Sunshine Jr.[2] The company would verify the employment status of the employee and forward the claims to Ayers. Ayers would check the accuracy of the claim and determine the appropriate rate under the policy coverage provisions. During the first year of the policy's existence, Ayers would then send the claim to First National which would issue a benefit check. In the later two years of the policy, First National authorized Ayers to write benefit checks on First National's

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[2] Certain health care providers who were aware of the relationships of the actors in this plan submitted claim forms directly to Ayers.

bank account. Ayers received a 6% commission from First National on the Sunshine Jr. policy.

Sunshine Jr. ended its relationship with First National in August 1986, on the third anniversary of the policy. Again with Ayers's assistance, the company found a new insurer for its employee benefits plan. First National later filed this suit.

II.

First National claims that it is entitled to relief for three different categories of wrongs by Sunshine Jr. First of all, the insurance company asserts that Sunshine Jr. did not meet and maintain the 75% participation level mandated by the contract throughout the course of the policy. The insurance company seeks lost profits based on the employees whom Sunshine Jr. should have enrolled to meet this requirement. Second, First National asserts that Ayers committed numerous errors in processing claims, resulting in payments by First National beyond its contractual obligations. The insurance company claims that Sunshine Jr. is liable for the amount of these overpayments because Ayers was its agent at the time. Finally, First National claims that Sunshine Jr. enrolled on the plan several persons who were not full-time employees under the terms of the policy, resulting in the payment of claims by First National for which it had no actual duty to pay.

The first preliminary matter the court must address is whether First National has actually charged violations of ERISA. First National's amended complaint filed in this court contained eight counts; the insurance company charged Sunshine Jr. with several violations of state law, and in one count with a violation of ERISA. The core charges of this complaint were contractual in nature, asserting that Sunshine Jr. had violated conditions set forth in the group insurance policy. First National did not, and does not, contend that Sunshine Jr.'s violation of the terms

of the plan resulted in harm to participants in its employee welfare benefits plan, however; First National pleads harm to itself arising from Sunshine Jr.'s violation of the terms of the policy.

In an order dated May 1, 1989, the court determined that Sunshine Jr. had maintained an employee welfare plan under the ERISA definition of such a plan. *See* Order of May 1, 1989, at 2-3.[3] Following from this ruling, the court also determined that First National's state law counts, including its breach of contract claims, were preempted by ERISA. *Id.* at 4-5.[4] However, because ERISA provides a federal cause of action for violations of the terms of the employee welfare benefit plan, the court denied Sunshine Jr.'s motion for summary judgment as to the ERISA claims, and the case proceeded to trial only on these claims. *See* 29 U.S.C.A. § 1132(a); *see also id.* § 1109.

Sunshine Jr. does not deny that it formed an employee welfare benefit plan covered by ERISA, but it maintains that the insurance policy does not itself constitute the plan. The company argues that a breach of the terms of the insurance contract is not equivalent to a violation of the employee welfare benefit plan, in the context of a fully insured plan.

The court agrees that an employee welfare benefit plan as defined by ERISA transcends the nature of a common

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[3] The court relied on 29 U.S.C.A. § 1002(1); *Massachusetts v. Morash*, ___ U.S. ___, 109 S.Ct. 1668 (1989); *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277, 280 & n.3 (11th Cir. 1987); *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982) (en banc); *Tucker v. Employers Life Insurance Co.*, 689 F.Supp. 1073, 1076 (N.D Ala. 1988).

[4] The court relied on *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549 (1987); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380 (1985); *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85, 103 S.Ct. 2890 (1983); *Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430, 431 (11th Cir.) (per curiam), *cert. denied*, ___ U.S. ___, 110 S.Ct. 158 (1989).

individual insurance policy. When it establishes such a plan for its employees, including a fully insured group plan, a company undertakes substantial legal duties toward the beneficiaries of the plan. *See* 29 U.S.C.A. § 1104. In contrast, the relationship between an insurance company and the insured, in the context of a common individual policy of insurance, is based on contractual duties; these duties are different in kind from the fiduciary duties of trust law. *See* Goldberg & Altman, *The Case for the Nonapplication of ERISA to Insurer's General Account Assets*, 21 Torts & Ins. L.J. 477, 481 (1986).[5] In addition, an employee welfare benefit plan has a type of independent legal status under ERISA; the plan can maintain and defend suits, and can also survive changes in its funding mechanism over time. As the Eleventh Circuit has observed, "The purchase of insurance is only a method of implementing a plan, fund, or program and is evidence of the existence of a plan but is not itself [an employee welfare benefit] plan." *Donovan v. Dillingham*, 688 F.2d 1367, 1375 (11th Cir. 1982) (en banc).

The differences between common individual policies of health insurance and ERISA plans do not necessarily mean that ERISA would not address a violation of the group policy at issue in this case. When an employer establishes an ERISA plan, that plan must have, as a practical matter, an ascertainable structure outlining the plan's benefits and the responsibilities of the various plan actors. Absent such structure, courts would encounter substantial difficulty in determining which plan actor had responsibility for performing plan functions. In the case of fully insured plans, if no other documents provide reference points for the

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[5] It is clear that Congress fashioned ERISA from the perspective of trust law, including the emphasis on fiduciary duties rather than contractual relations. *See Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 152-53 & nn.6, 8, 156-57, 105 S.Ct. 3085, 3095-96 & nn.6, 8, 3097-98 (1985) (Bren-nan, [sic] J., joined by White, Marshall and Blackmun, JJ., concurring in the judgment).

structure of the plan, the court may permissibly look to the insurance policy for this structure. *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277, 280-81 (11th Cir. 1987), is just such a case. In *Belasco*, as here, the ERISA plan in effect incorporates the terms of the group policy. Thus, if Sunshine Jr. has indeed violated the terms of the policy between it and First National, it has violated as well the terms of its employee welfare benefit plan. First National has, therefore, charged violations under ERISA.

B.

The next preliminary issue is whether First National is a proper party to complain of violations of the plan. The insurance company purports to bring this action as a fiduciary of the plan. The evidence at trial established that First National was a plan fiduciary during the time the policy between it and Sunshine Jr was in effect. Congress defined plan fiduciaries under ERISA in the following terms:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C.A. § 1002(21)(A). This definition has been broadly construed by most courts. *See, e.g., Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Donovan v. Mercer*, 747 F.2d 304, 308 (5th Cir. 1984). While an insurer is not a plan fiduciary simply by virtue of the fact that it provides

insurance, when the insurer exercises discretionary authority over the payment of claims or other aspects of the plan, it may assume fiduciary status under ERISA. *See* 29 C.F.R. § 2560.503(g)(2); *Baker v. Big Star Division*, 893 F.2d 288 (11th Cir. 1989); *American Federation of Unions v. Equitable Life Ins. Co.*, 647 F. Supp. 947, 953 (M.D. La. 1985), *aff'd in relevant part*, 841 F.2d 658, 664-65 (5th Cir. 1988); *Blue Cross and Blue Shield of Alabama v. Peacock's Apothecary, Inc.*, 567 F. Supp. 1258, 1265-66 (N.D. Ala. 1983).[6] First National was a fiduciary under both the first and third subsections of § 1002(21)(A), since it bore discretionary authority in the processing and payment of claims under the policy, and thus in the administration of the plan. The court further finds that First National bore authority and control for the same reason in the management and distribution of plan assets. *See Chicago Board Options Exchange v. Connecticut General Life Ins. Co.*, 713 F.2d 254, 260 (7th Cir. 1983); *Jacobson v. John Hancock Mutual Life Ins. Co.*, 662 F. Supp. 1103, 1107-11 (D. Conn. 1987).[7]

Congress authorized fiduciaries to bring actions under ERISA in two situations pertinent to this action. A fiduciary may sue for breach of fiduciary duty. 29 U.S.C.A. §§ 1132(a)(2); *see also id.* § 1109. The fiduciary may also sue: "to enjoin any act or practice which violates any

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[6] *See also Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 737-38 (7th Cir. 1986), *cert. denied*, 482 U.S. 915, 107 S.Ct. 3188 (1987); *Arakelian v. National Western Life Ins. Co.*, 680 F. Supp. 400, 404 (D.D.C. 1987); *Jacobson v. John Hancock Mutual Life Ins. Co.*, 662 F. Supp. 1103, 1112 (D. Conn. 1987); *McNeese v. Health Plan Marketing, Inc.*, 647 F. Supp. 981, 984-85 (N.D. Ala. 1986); *The Sixty-Five Security Plan v. Blue Cross and Blue Shield of Greater New York*, 583 F. Supp. 380, 387 (S.D.N.Y. 1984).

[7] In a self-funded plan, the plan's assets are generated by employer contributions and maintained in separate plan accounts. But in a plan like Sunshine Jr.'s the insurance policy itself constitutes the plan's assets. The plan has shifted the risk of future health expenses to the insurer; it is this shift that constitutes the assets of the plan.

provision of [ERISA] or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of [ERISA] or the terms of the plan." § 1132(a)(3)(A), (B).

First National has not stated a cause of action against Sunshine Jr. under § 1132(a)(2). Fiduciary duties under ERISA, as under the common law of trusts, run vertically, not horizontally. *See Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 152-53, 105 S.Ct. 3085, 3095-96 (1985) (Brennan, J., joined by White, Marshall and Blackmun, JJ., concurring in the judgment) (fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits). While Sunshine Jr. owes First National certain contractual duties, it has no fiduciary relationship with the insurance company. As the court noted above, the wrongs with which First National charges Sunshine Jr. relate to these contractual duties. Moreover, a fiduciary may seek relief under § 1132(a)(2) only on behalf of the plan, and the relief it obtains must inure to the plan. *Russell*, 473 U.S. at 141, 105 S.Ct. at 3089 (majority opinion). Again, the insurance company does not seek relief on behalf of the plan in this lawsuit.

Section 1132(a)(3) is not, on the other hand, necessarily concerned with fiduciary duties. Rather, the focus of that section is on violations of the terms of the plan, whether or not such violations would rise to the level of a breach of fiduciary duty. Indeed, the universe of possible defendants under § 1132(a)(3) is not limited to fiduciaries. As the court noted above, the terms of the insurance policy between Sunshine Jr. and First National also constitute terms of the company's employee welfare benefits plan. Thus, since First National is a fiduciary of this plan, it has standing under the literal terms of § 1132(a)(3) to file an action to enjoin violations of that policy or seek other redress for such violations. The court finds that First National may maintain this action under § 1132(a)(3).[8]

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[8] Since the court finds that the express terms of ERISA envision the

C.

First National claims that it was damaged by Sunshine Jr.'s failure to comply with the policy's 75% participation requirement. The insurance company argues that this clause is critical to the viability of the plan, because it aids the insurer in its task of spreading the risk of health expenses. According to First National, the 75% participation requirement provides a safeguard against the threat of adverse selection. Adverse selection occurs when the least healthy segment of a company's workforce participates in the plan, while the most healthy segment does not, either because it can find less expensive insurance coverage elsewhere or because it simply accepts the risk of medical expenses itself. If strictly enforced, the 75% participation level limits the extent of adverse selection by forcing at least part of the lowest-risk segment of the company's workforce to participate in the plan. This segment presumably will contribute a high ratio of premium income to the amount of claims it will generate. First National claims that it would have netted approximately $234,000 profits during the three years of the plan, had Sunshine Jr. complied with the 75% requirement.

Sunshine Jr. admitted at trial that it never attempted to determine whether it was technically in compliance with the participation requirement. It stated that while such a determination was theoretically possible, the task would be a mammoth undertaking. The company employed roughly 2,000 people on any given day during the years 1983 through 1986. However, Sunshine Jr. also experienced extremely high turnover rates of employment. It in

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type of action First National presents in this case, it need not address the question of whether First National has an implied right of action under the statute. *See Dime Coal Co., Inc. v. Combs*, 796 F.2d 394, 397-99 (11th Cir. 1986) (finding no implied right of action under ERISA for an employer to recover contributions erroneously converted to plan assets).

effect replaced its complete workforce twice over the course of a year. Thus, the company would generate roughly 6,000 employee records during a year's time. To determine whether the participation requirement was satisfied, Sunshine Jr. would have to retrieve each employee's enrollment card and determine whether that employee was eligible to participate, and whether she chose to participate.[9] Sunshine Jr. would also have to review that employee's payroll history to ensure that she had worked the requisite number of hours recently to remain eligible to participate in the plan. Although First National had the ability under its contractual relation with Sunshine Jr. to demand access to the records necessary to make this determination, it also never attempted to perform this task.

While the court does not doubt that the 75% participation clause contributes to some degree to the effective viability of an employee welfare benefit plan, it is convinced that First National may not recover damages for violation of the requirement. First of all, the insurance contract between the parties expressly limits the remedy available to First National for any failure by Sunshine Jr. to meet this requirement to termination of the policy. The pertinent section reads:

> The Insurance Company may terminate this policy on the first policy anniversary or on any premium due date thereafter, by giving written notice to the Policyholder at least thirty-one days in advance, if, on the termination date specified in such notice, the number of persons insured hereunder is less than the number of percentage of the persons eligible for insurance hereunder specified in the Schedule of Insurance.

First National concededly never attempted to invoke that remedy. Nor did the insurance company ever communicate

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[9] The evidence suggested that a significant percentage of Sunshine Jr. employees never submitted enrollment cards to their employer.

its concern regarding participation levels to Sunshine Jr. for its response.

In any event, the company did not prove that this alleged violation of the plan caused it any harm. As noted above, First National claims approximately $234,000 as damages for violation of this requirement. In arriving at this figure, First National estimated, through a statistical study using First National's definition of an eligible employee, the amount of premiums it would have collected during the years of the policy if Sunshine Jr. had complied with the participation requirement.[10] The insurance company then assumed that it would pay only 75 cents of every dollar of premium out to beneficiaries in claims. After allowing for commissions, premium taxes, and additional overhead, First National estimated it would have made roughly $234,000 in profits off the additional employees enrolled on the plan.

Aside from the definitional and methodological differences between the parties, the court finds this estimate entirely too speculative a basis on which to award relief. First National did not support its assertion that it would have enjoyed a 75% ratio of claims to premium income with any persuasive evidence. On the contrary, Sunshine Jr. presented significant evidence showing, to the extent past profit experience in similar ventures provides some hint of expected profits, that First National's profit esti-

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[10] First National's position at trial was that all employees who worked at least 30 hours a week or 1,000 hours each year and who had worked for Sunshine Jr. for at least six months were counted as eligible for purposes of determining the participation level. Sunshine Jr. maintained that employees who opted out of participation in the plan because of alternative coverage, such as coverage under a spouse's health plan, should not be included in the range of eligible employees for participation requirement purposes. Because First National cannot recover on this claim in any event, the court does not decide this issue.

mates were implausibly rosy.[11] The main point of the evidence, however, was that no insurer can say with reasonable certainty what its ratio of claims to premium will be for any given group, and First National's main witness admitted as much. As is often the case with pleas for lost profits, the plaintiff has simply not proved its damage figure with a reasonable degree of certainty. *See generally* 5 A. Corbin, Corbin on Contracts § 1022 at 135-47 (1964).

D.

First National also seeks repayment from Sunshine Jr. of certain amounts paid by First National to plan beneficiaries beyond levels required by the insurance contract. First National's position at trial was that these overpayments were the result of errors committed by Ayers in processing claims. First National asserts that Sunshine Jr. is liable for these overpayments on the theory that Ayers acted as Sunshine Jr.'s agent when he committed the errors, thus making Sunshine Jr. liable as a principal for its agent's mistakes. The amount of relief sought by First National under this theory is approximately $6,700.

The court finds that First National is not entitled to this figure. First National relies on the legal rule that a principal is liable for the acts of its agents committed within the scope of the agency relationship. *See* Restatement (Second) of Agency §§ 140, *et seq.* (1958) The evidence adduced at trial suggested that Ayers may have acted as Sunshine Jr.'s agent with respect to advice and services in obtaining insurance for its employee benefits plan. The evidence did not establish, however, that the

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[11] At one point, the president of First National admitted that the years covered by this litigation were peak bad years for health care insurers nationwide. The court also notes that First National in large part left the group health insurance field around or shortly after the termination of its contract with Sunshine Jr.

scope of this agency agreement extended to Ayers's responsibilities in processing claims under the policy. *Id.* § 34 (scope of agent's authority determined in light of accompanying circumstances). On the contrary, the evidence established that Sunshine Jr. never bore responsibility under the contract or the terms of the plan for processing claims; the company only verified the employment status of the claimant, a matter unrelated to First National's theory of relief. The evidence showed that either Ayers acted independently in processing claims or he acted as First National's agent in this function. The court has already noted First National's discretion as a plan fiduciary in determining the validity of benefit claims under the policy. Significantly, First National, not Sunshine Jr., monitored and supervised Ayers in processing claims and conducted audits of his office in this regard. The court also notes that First National allowed Ayers to sign checks on its account to make benefits payments. Finally, when Ayers stopped processing the claims late in the life of the relationship between the parties, it was First National, not Sunshine Jr., who replaced Ayers in performing this function. In sum, the court finds Ayers did not act as Sunshine Jr.'s agent in processing claims under the policy. Thus, First National cannot recover from Sunshine Jr. for any mistakes made by Ayers in performing that duty.[12]

First National finally seeks damages for benefits paid by the insurer to ineligible employees whom Sunshine Jr. enrolled in the plan, or to their health care providers. In each instance, at the time these claims accrued, the claim-

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[12] First National also asserts that Sunshine Jr. impeded the insurance company's attempts to collect overpayments by advising its employees not to reimburse First National. The insurance company can point to only one specific instance of such conduct, however. This instance relates only to an off-hand response by a Sunshine Jr. employee to the question of another employee, to the effect that if the second employee felt she was in the right, she should not pay anything to First National. The court rejects First National's suggestion that this provides any basis for relief against Sunshine Jr.

ant was either no longer a Sunshine Jr. employee or no longer met the eligibility requirements of the insurance policy. As the court noted above, in the course of dealing between these parties, Sunshine Jr. bore the responsibility of verifying the employment status of a claimant before forwarding the claim to Ayers for processing and payment. First National seeks over $40,000 in damages as a result of these alleged violations of the plan.[13]

Even if Sunshine, Jr. effectively violated the terms of the plan by improperly enrolling employees, First National is not entitled to the relief it seeks for this violation: compensatory damages. It is settled law in this circuit that extra-contractual compensatory damages are a form of legal, not equitable, relief which is unavailable under § 1132(a)(3). *See, e.g., United Steelworkers v. Connors Steel Company*, 855 F.2d 1499, 1508-09 (11th Cir.), *cert. denied*, 109 S. Ct. 1568 (1989); *see also Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173, 1174 (11th Cir.), *cert. denied*, 109 S.Ct. 90 (1988). Admittedly, the compensatory damages sought by First National differ somewhat from those sought in other reported § 1132(a)(3) cases. Typically, the issue arises when a beneficiary seeks compensatory damages for mental or emotional distress arising out of the failure to obtain benefits under the plan. First Na-

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[13] One component of this $40,000 figure is an alleged $24,000 payment by First National on a claim submitted by Vivian Carter. At trial, the court sustained Sunshine Jr.'s objection to introduction of evidence relating to this claim, on the grounds that First National had raised it too late in the litigation. This claim was not identified in the pleadings, nor in the pretrial order. The court agreed that allowing First National to press this claim at such a late juncture would unfairly prejudice the defendant.

The parties have briefed the question of the validity of this ruling in their posttrial briefs. In light of the court's conclusion that First National is precluded by the terms of ERISA from recovery of compensatory damages, the claim based on the Vivian Carter payment is in any event not viable.

tional's damages arose as an arguably more foreseeable consequence of Sunshine Jr.'s violation of the plan than did the emotional distress damages in *Connors Steel, supra*. However, this distinction does not have any bearing on whether the damages sought by First National are equitable or legal in nature; the fact remains that compensatory damages in most contexts are a traditional legal remedy. *See Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, ___ U.S. ___ 110 S.Ct. 1339, 1347 (1990); 5 J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice para. 38.19[1] at 38-172 to 38-173 (1988); *cf. Walker v. Ford Motor Co.*, 684 F.2d 1355, 1363-64 (11th Cir. 1982) (holding that "other equitable relief" available under Title VII does not include compensatory damages which are not concomitants of employment). It is true that a court of equity could always grant monetary damages as an incident to primary equitable relief, in order to afford a litigant complete recovery. *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, ___ U.S. at ___ 110 S.Ct. at 1348; 5 J. Moore, J. Lucas & J. Wicker, *supra* at para. 38.19[2]. But in this case, First National seeks no primary equitable relief. Its claim is for compensatory damages, and to cast these damages as equitable in nature under these circumstances would apparently write Congress's express limitation of recoveries under § 1132(a)(3) to such relief out of the statute. This the court cannot do.

First National characterizes the relief sought as "make-whole" relief. These semantical gymnastics are not helpful. Extra-contractual compensatory damages can be so characterized with equal ease; the beneficiary whose claim has been denied can be said to seek monetary damages to represent the value of the psychic harm suffered. Thus, by being compensated for the injury, the beneficiary is put in as good a position as she would have enjoyed had the injury not occurred. She is "made whole." But this exercise does not convert her claim for compensatory damages from a legal to an equitable remedy.

First National also insists that the relief it seeks from Sunshine Jr. is restitution. The court cannot agree. Restitution refers to a remedy designed to return to the plaintiff the value of something that the defendant wrongfully received from plaintiff. *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, ___ U.S. at ___ 110 S.Ct. at 1348-49. First National made these overpayments to either beneficiaries or health care providers, not to Sunshine Jr. While First National might have a claim for restitution against these third parties, it clearly does not have such a claim against Sunshine Jr. *See Id.*; *see also* 5 A. Corbin, Corbin on Contracts § 996 at 17 (in determining the amount of restitution recoverable, expenditures by the plaintiff are not included unless they were received by the defendants); Restatement of Restitution § 1 (1937).[14]

For the above reasons, First National is also not entitled to recover on its previously discussed claims that Sunshine, Jr. failed to meet the 75% participation requirement and that Sunshine Jr.'s agent committed errors in processing claims.[15]

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[14] In *TransAmerica Mortgage Advisor, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 100 S.Ct. 242 (1979), the Supreme Court found an implied private right of action under the Investment Advisers Act of 1940, 15 U.S.C.A. §§ 80b-1 to 80b-21, limited to the equitable remedies of rescission and restitution. The Court opined that while an investor could recover the value of the consideration given under the investment contract, less any value conferred by the other party, the injured investor could not recover for the diminution in value of her investment resulting from the defendant's breach of fiduciary duties. The Court deemed this loss in value to be compensatory in nature, and including it within the definition of restitution "could provide by indirection the equivalent of a private damages remedy that we have concluded Congress did not confer." *Id.* at 24 n.14, 100 S.Ct. at 249 n.14.

[15] The court recognizes that outside the context of ERISA the relief requested by First National would be available. However, today's result was apparently intended by Congress since it restricted § 1132(a)(3) to only equitable relief. *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564-65 (11th Cir. 1987) (noting that the practical eradication of any means

III.

Finally, First National requests this court to order Sunshine Jr. to render an accounting. At common law, this equitable remedy appears to have been available in three situations: when a fiduciary relationship existed between plaintiff and defendant; when plaintiff and defendant maintained mutual accounts or if a one-sided account was particularly complicated; and when the plaintiff needed the accounting for discovery purposes. 1 Am. Jur. 2d *Accounts and Accounting* § 51 (1962). The court finds that First National has not proffered any predicate for this court to order an accounting in this case. Sunshine Jr. does not owe any fiduciary duty to First National, as the court noted above. First National also does not need the accounting for discovery purposes, since Sunshine Jr. has already made its records available to First National. The fact that First National may wish Sunshine Jr. to undertake the arduous task of reviewing the complete records of the history between the parties rather than perform this task itself is no basis for a court order. Although the scenario of particularly complex accounts is initially plausibly analogous to this case, the court concludes that First National is not entitled to an accounting under this theory either. First National has not alleged, nor does any evidence suggest, that Sunshine Jr. failed to submit the appropriate premium payments to First National for the number of employees enrolled in its plan at any given period of time. While First National does maintain that Sunshine Jr. should have enrolled more of its employees than it did, this charge does not relate to or support First National's request for an accounting. The action for an accounting is simply off-point and unrelated to First National's substantive disputes with Sunshine Jr.

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of redress may be the necessary result of federal preemption); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986) (same), *cert. denied*, 481 U.S. 1016, 109 S.Ct. 1893 (1987).

An appropriate judgment will be entered.

DONE, this the 5th day of July, 1990.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 88-T-575-N

FIRST NATIONAL LIFE INSURANCE COMPANY, etc.,
Plaintiff,

v.

SUNSHINE JR. STORES, INC., etc., et al.,
Defendants.

FILED

MAY 1 1989

CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

ORDER

This action is now before the court on defendant Sunshine Jr. Stores, Inc.'s November 23, 1988 motion for summary judgment and on plaintiff First National Life Insurance Company's December 20, 1988 motion to strike the defendant's jury demand. For the reasons that follow, the motion for summary judgment is due to be granted in part and denied in part and the motion to strike the jury demand is due to be granted.

I.

This case involves disputes surrounding a group health insurance policy issued by First National to Sunshine Jr.

in August 1983. The policy provided health, medical and disability coverage to all employees of Sunshine Jr. who worked a minimum of 30 hours per week. Under this plan, Sunshine Jr. was to enroll all eligible employees on the plan and to remit the appropriate premium for that number of employees to First National. First National alleges that Sunshine Jr. enrolled ineligible persons on the policy, resulting in the payment of claims by First National for which it had no legitimate duty to pay. First National also claims that it paid certain "pre-certification penalties" which Sunshine Jr. refused to pay.

The amended complaint contains eight counts: one of these charges Sunshine Jr. with violations of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A. §§ 1001-1461; the other counts charge violations of state law under tort and contract theories. As this court noted in its September 8, 1988, order denying Sunshine Jr.'s motion to dismiss, the applicability of ERISA to the plan in this case is of critical importance because of the preemptive effect of that law on state law causes of action relating to employee benefit plans. The court turns first, therefore, to this issue.

II.

A.

By the terms of the Act, ERISA covers "employee welfare benefit plans" defined as:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or ben-

> efits in the event of sickness, accident, disability, death or unemployment. . . .

29 U.S.C.A. § 1002(1). *See Massachusetts v. Morash*, ___ U.S. ___, 57 U.S.L.W. 4429, 4430 (U.S. April 18, 1989); *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277, 280 & n.3 (11th Cir. 1987). The Eleventh Circuit has set forth an analytical framework for determining coverage issues under ERISA, composed of five elements: (1) a "plan, fund, or program" (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits (5) to participants or their beneficiaries. *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982) (en banc).

Although the parties appear oddly reticent to discuss the issue of ERISA's applicability to the group policy at issue in this suit, the court is of the opinion this plan is clearly an "employee welfare benefit plan" under ERISA. The plan covers expenses typical to health insurance plans, including medical expenses resulting from illness and accident, and it includes provisions relating to life insurance options as well. Without belaboring the issue, the court finds that the group health insurance plan in this case falls within the terms of § 1002(1). *See, e.g., Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430, 431 (11th Cir. 1989) (per curiam); *Tucker v. Employers Life Insurance Co.*, 689 F. Supp. 1073, 1076 (N.D. Ala. 1988).

B.

Delaying for the moment discussion of Sunshine Jr.'s arguments for summary judgment on the ERISA claim, the court next considers the viability of First National's other claims in light of ERISA's potent preemptive effect.

These claims include a claim for an accounting, several fraud claims, willful and wanton misconduct on the part of Sunshine Jr. in its business dealings with First National, and breach of contract and of the duty to act in good faith. Recent cases establish that all of these common law causes of action are preempted by ERISA, requiring judgment in Sunshine Jr.'s favor on these claims as a matter of law.

The question of whether a certain state law action is preempted by federal law is fundamentally one of congressional intent. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 1552 (1987). In the case of ERISA, Congress clearly and expressly signalled its intent that the Act would "supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," with certain exemptions. § 1144(a). The Supreme Court has time and again interpreted this preemption clause expansively, in light of the legislative history. *See Dedeaux, supra; Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890 (1983). The Court has observed that § 1144(a) applies beyond "state laws specifically designed to affect employee benefit plans." *Shaw*, 463 U.S. at 98, 103 S.Ct. at 2900. A state law relates to an ERISA plan if "in the normal sense of the phrase, . . . it has a connection with or reference to such a plan." *Id.* at 97, 103 S.Ct. at 2900.

Each of the state law causes of action asserted by First National relates to the ERISA plan under this test. The Eleventh Circuit has recently addressed this question with reference to virtually the same causes of action, finding them preempted by the Act. *Amos*, 868 F.2d at 430. In *Amos*, the court also held that such causes of action did not fall within any of the exemptions to ERISA preemptive effect set forth in the statute. *Id.* Therefore, First National's state law causes of action are preempted by ERISA

and summary judgment in Sunshine Jr.'s favor on those causes of action is in order.

C.

Sunshine Jr. also moves for summary judgment as to the ERISA claim, contending that First National lacks standing to seek relief under this statute. The Act provides:

> A civil action may brought—
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

§ 1132(a)(3).

First National purports to bring its ERISA claim as a fiduciary of the plan. The Act defines fiduciaries in the following terms:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management, or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

§ 1002(21)(A). As noted by this court in its September 8, 1988, order, this definition has been broadly construed by

most courts. *See e.g., Donovan v. Mercer,* 747 F.2d 304 (5th Cir. 1984); *McKinnon v. Cairns,* 698 F. Supp. 852 (W.D. Okla. 1988); *McNeese v. Health Plan Marketing, Inc.,* 647 F. Supp. 981 (N.D. Ala. 1986). Given that Sunshine Jr. concedes in its letter brief filed March 7, 1989, that First National retained authority and control with respect to the plan, and in the absence of evidence suggesting otherwise, the court is of the opinion based on the current record that First National may be a fiduciary empowered to bring suit by § 1002(21)(A).

Sunshine Jr. does not rigorously debate this point. Rather, the company argues that First National is not suing on behalf of anyone's interests but its own and that it is not attempting to preserve the integrity of the plan, which ended in August 1986. Sunshine Jr. does not cite authority to support its proposition that these are requirements under § 1132(a)(3), however, and the court finds no reason to doubt First National's contention that it is alleging violations of the terms of the plan by Sunshine Jr. Since such a complaint is expressly recognized by § 1132(a)(3), and since the court finds material issues of disputed fact going to this claim, Sunshine Jr. is not entitled to summary judgment as to First National's ERISA cause of action.

III.

To summarize, this court finds that the plan involved in this suit is covered by ERISA. The court also finds that ERISA preempts First National's causes of action based on state law and that summary judgment in Sunshine Jr.'s favor is proper as to these claims. The court denies Sunshine Jr.'s motion for summary judgment as to the ERISA claim.

With respect to First National's motion to strike Sunshine Jr.'s jury demand, the settled rule in this circuit is that a litigant does not possess a right to a jury trial in

an ERISA action. *Chilton v. Savannah Foods & Industries, Inc.*, 814 F.2d 620, 623 (11th Cir. 1987); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. Unit A 1980). Thus, the motion to strike is due to be granted.

Accordingly, it is ORDERED that defendant Sunshine Jr. Stores, Inc.'s November 23, 1988, motion for summary judgment be and it is hereby granted with respect to counts 1, 2, 4, 5, 6, 7 and 8 of the amended complaint and denied with respect to count 3.

It is further ORDERED that plaintiff First National Life Insurance company's December 20, 1988, motion to strike the jury demand, as amended on January 6, 1989, be and it is hereby granted.

It is further ORDERED that defendant Sunshine Jr. Stores, Inc.'s March 10, 1989, motion to strike, be and it is hereby denied.

It is further ORDERED that the nonjury trial of this cause is reset for June 8, 1989, at 9:00 a.m. in the second floor courtroom of the federal courthouse in Montgomery, Alabama.

The clerk of the court is DIRECTED to notify the attorneys by telephone.

DONE, this the 1st day of May, 1989.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 USCS § 1111].

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1).

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

Supreme Court, U.S.
FILED
DEC 17 1992
OFFICE OF THE CLERK

No. 92-755

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

FIRST NATIONAL LIFE INSURANCE COMPANY
Petitioner,

v.

SUNSHINE JR. FOOD STORES, INC.
Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF SUNSHINE JR. FOOD STORES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 17, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit's decision that FNL's state law claims were pre-empted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et. seq.* is appropriate for review by this Court as the decision was based on the application of recognized principles of law to the facts before the court.

2. Whether the Eleventh Circuit's decision that no monetary damages were owed by Sunshine to FNL is appropriate for review by this Court as the decision was based on the application of recognized principles of law to the facts before the court.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner/Plaintiff

First National Life Insurance Company ("FNL")

Parent Corporation of FNL:
American Life Insurance Corporation

Parent Corporation of American Life Insurance Corporation:
New South Investment Corporation

Subsidiary of FNL:
Capitol Towers, Inc.

Respondent/Defendant:
Sunshine Jr. Food Stores, Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding and Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	iv
Reference to Report of Opinions	1
Statutes and Regulations Involved in this Case	1
Statement of the Case	1
Summary of Argument	6
Argument	7
A. ERISA Pre-empts FNL's State Law Claims	7
B. FNL is not Entitled to Monetary Relief Under ERISA	11
1. FNL is not entitled to an accounting	12
2. FNL is not entitled to relief for payments made on behalf of allegedly ineligible employees	13
3. FNL failed to prove lost profits	15
4. Sunshine was not responsible for adjusting claims	16
Conclusion	17
Appendix	1a

TABLE OF AUTHORITIES

Cases Cited: *Page*

Alessi v. Raybestos-Manhattan, Inc.,
451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) 8

Blue Cross and Blue Shield of Ala. v. Weitz,
913 F.2d 1544 (11th Cir. 1990) 14

Cromwell v. Equicor-Equitable HCA Corp.,
944 F.2d 1272 (6th Cir. 1991) 15

Fort Halifax Packing Co. v. Wayne,
482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987) 9

FMC Corp. v. Holliday,
498 U.S. 52, 111 S.Ct. 403,
112 L.Ed.2d 356 (1990) 8, 9

Ingersoll-Rand Co. v. McClendon,
498 U.S. 133, 111 S.Ct. 478,
112 L.Ed.2d 474 (1990) 8

Lee v. E.I. DuPont de Nemours & Co.,
894 F.2d 755 (5th Cir. 1990) 15

Mackey v. Lanier Collections Agency & Service, Inc.,
486 U.S. 825, 108 S.Ct. 2182,
100 L.Ed.2d 836 (1988) 8, 9

Massachusetts Mutual Life Ins. Co. v. Russell,
473 U.S. 134, 105 S.Ct. 3085,
87 L.Ed.2d 96 (1985) 11, 12

Nachwalter v. Christie,
805 F.2d 956 (11th Cir. 1986) 15

Northwestern Adm'rs, Inc. v. B.V. & B.R., Inc.,
813 F.2d 223 (9th Cir. 1987) 15

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41, 107 S.Ct. 1549,
95 L.Ed.2d 39 (1987) 8

TABLE OF AUTHORITIES (Continued)

Cases Cited: *Page*

Shaw v. Delta Airlines, Inc.,
463 U.S. 85, 103 S.Ct. 2890,
77 L.Ed.2d 490 (1983) 8, 9

Smith v. Dunham-Bush, Inc.,
959 F.2d 6 (2d Cir. 1992) 15

Straub v. Western Union Tel. Co.,
851 F.2d 1262 (10th Cir. 1988) 15

Warren v. Society Nat'l Bank,
905 F.2d 975 (6th Cir. 1990), *cert. denied*, ___ U.S. ___,
111 S.Ct. 2256, 114 L.Ed.2d 709 (1991) 11

Other Authorities:

29 U.S.C. § 1001 *et seq.* 3

29 U.S.C. § 1109 11

29 U.S.C. § 1109(a) 47a

29 U.S.C.A. § 1132(a)(2) 7, 11, 12

29 U.S.C. § 1132(a)(3) 5, 6, 7, 12, 13, 14, 15

29 U.S.C. § 1132(a)(3)(A), (B) 11

29 U.S.C. § 1144(a) 8

120 Cong. Rec. 29197 (1974) 9

120 Cong. Rec. 29933 (1974) 9

Restatement of Restitution (Second), § 1 13

REFERENCE TO REPORT OF OPINIONS

The United States Court of Appeals for the Eleventh Circuit affirmed the trial court's judgement in *First Nat'l Life Ins. Co. v. Sunshine Jr. Food Stores, Inc.*, 960 F.2d 1546 (11th Cir. 1992), following a non-jury trial in which the trial court ruled in favor of the Defendant, Sunshine Jr. Food Stores, Inc. on the claims of the Plaintiff, First National Life Insurance Company. *See* App. 1a; App. 23a.

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The relevant statutory provisions are set out in the appendix hereto as follows:

Authority	Appendix Page
29 U.S.C. §1109(a)	47a
29 U.S.C. §1132(a)	48a
29 U.S.C. §1144(a)	49a

STATEMENT OF THE CASE

This action relates to a group life and health insurance policy issued by First National Life Insurance Company ("FNL") to Sunshine Jr. Food Stores, Inc. ("Sunshine") on August 1, 1983. The policy was used to fund an employee welfare benefit plan established by Sunshine to provide health benefits to its employees. Sunshine is a corporation which owns and operates a chain of convenience marts in five states in the Southeastern region of the United States. The company offered group health benefits to its employees through a fully-insured plan. Eligible employees who wished to participate in the plan paid one-half of the premium for these benefits. Sunshine paid the other half. Prior to August 1983, Sunshine ar-

ranged to provide these benefits through a group policy with Aetna Insurance Company. In 1983, because of rising premiums with Aetna, Sunshine began looking for another insurance carrier. The company contacted Frank Ayers ("Ayers"), an insurance broker. Ayers was a licensed general agent for FNL and had been for several years prior to being contacted by Sunshine. Ayers aided Sunshine in replacing the Aetna policy with an FNL policy. The new group policy between FNL and Sunshine took effect on August 1, 1983.

Under the policy, FNL provided health, medical, and disability coverage to employees of Sunshine who worked either a minimum of 30 hours a week or a minimum of 1,000 hours a year. Eligibility for benefits under this policy did not begin until an employee had worked for the company for six months. Under the plan, Sunshine enrolled employees who were eligible and elected to participate in the plan. The FNL policy directed Sunshine to enroll at least 75% of its eligible employees under the policy. If a Sunshine employee was covered by a separate health insurance policy, that employee could opt out of coverage under the FNL policy.

The FNL policy did not expressly set out all of the details of the administration of the plan. However, the following is a description of the manner in which administrative responsibilities were generally allocated between the parties. For every billing period, Sunshine prepared a computer printout of its currently enrolled employees, calculated and collected the appropriate premiums for that number, and forwarded a premium check along with the printout to Ayers. Ayers and his employees in turn forwarded the materials to FNL.

Employees or their health care providers typically submitted claim forms to Sunshine, which forwarded the claim forms to Ayers. Ayers checked the accuracy of the claim and determined the appropriate rate to be paid under the policy. During the first year of the policy's existence, Ayers sent claims to First National which would issue benefit checks. In the latter two years of the policy, FNL authorized Ayers to write claims

checks on FNL's bank account. Ayers received a 6% commission from FNL on the Sunshine policy.

FNL alleged in the Statement of the Case contained in its petition that after the renewal of the policy it requested information regarding employee participation levels from Sunshine and that Sunshine refused to provide the requested material. (FNL's petition at 16). This is not accurate. A request was made by FNL for certain documents. However, it was not linked to employee participation levels. Sunshine requested an explanation for the request. No explanation was forthcoming. *See* Appendix ("App.") 32a. If FNL deemed Sunshine's actions to be a violation of the insurance contract, it could have terminated the policy. It did not. Indeed, the following year the policy was renewed by FNL. App. 33a.

Sunshine chose to end its relationship with FNL in August 1986. Sunshine thereafter found a new insurer for its employee benefit plan. FNL subsequently brought suit alleging various state law claims including breach of contract, breach of the duties of due care and good faith, willful and wanton conduct, misrepresentation, failure to disclose material facts, and for an accounting. The complaint also alleged violations of the Employee Retirement Income Security Act ("ERISA") 29 U.S.C. § 1001, *et. seq.* This suit, however, was not brought by a plan fiduciary to recover monies owed the plan or its beneficiaries. Rather, it was brought solely to benefit the insurance company, FNL.

Sunshine filed a motion for summary judgment. The district court found that the benefits provided to Sunshine's employees constituted an employee welfare benefit plan under ERISA and that ERISA pre-empted all of FNL's state law claims. App. 42a-43a. Sunshine's motion for summary judgment was granted as to the state law claims, but was denied as to the claims stated under ERISA. App. 48-9a.

The district court permitted FNL a trial on the merits as to whether it, as a plan fiduciary, was individually entitled to re-

lief under ERISA. At trial, FNL claimed it was entitled to compensatory damages under ERISA for three categories of alleged wrongs by Sunshine. First, FNL asserted that Sunshine did not maintain the 75% employee participation level mandated by the policy. The insurance company contended it lost profits with respect to employees which Sunshine allegedly should have enrolled to meet this requirement, but did not. Second, FNL asserted that Ayers committed numerous errors in processing claims, which resulted in payments by FNL beyond its contractual obligations. FNL claimed that Sunshine was liable for the amount of these overpayments because Ayers was Sunshine's agent at that time. Finally, FNL sought to recover from Sunshine claims paid by FNL on behalf of Sunshine employees who FNL alleged were ineligible, but who were nevertheless enrolled for coverage under the policy.

The district court held that FNL was not entitled to recover damages relating to the 75% participation clause for two reasons. First, the court found that FNL failed to prove its claim for lost profits for the alleged violation of this provision with the requisite reasonable degree of certainty. App. 34a. Second, the insurance contract between the parties expressly limited the remedy available to FNL for any failure by Sunshine to meet this requirement to termination of the policy. FNL never invoked the remedy. App. 32a-33a.

The district court also rejected FNL's assertion that Sunshine was liable for overpayment of claims by Ayers to plan beneficiaries. App. 34a. FNL contended that Ayers, who adjusted the claims, was the agent of Sunshine for purposes of processing claims. The district court held that the evidence established that Sunshine had no responsibility under the contract or the terms of the plan for processing claims and that Ayers either acted independently in processing claims or he acted as FNL's agent in performing this function. App. 35a.

The district court also denied FNL's claim for damages for benefits paid by the insurer on behalf of allegedly ineligible employees. App. 38a. FNL alleged that at the time the claims

occurred the claimants were either no longer Sunshine employees or did not meet the eligibility requirements of the insurance policy. FNL sought approximately $40,000 in damages for these alleged violations. Of the $40,000, a claim for $24,000 was rejected by the district court because FNL raised the claim for the first time at trial. The court held that to permit FNL to press the claim at such a late juncture would unfairly prejudice Sunshine. FNL's actual claim for payments to allegedly ineligible employees was approximately $16,000. App. 36a.

The district court held that FNL's claim for compensatory damages was a form of legal, not equitable, relief which was unavailable to FNL under ERISA generally and 29 U.S.C. § 1132(a)(3) in particular. App. 37a. FNL's demand for an accounting was rejected because Sunshine did not owe a fiduciary duty to FNL, because FNL never demanded an accounting during the term of the policy, because all the documents necessary for an accounting were made available to FNL during discovery, and because FNL did not take advantage of the opportunity to perform an accounting when the requisite documents were made available. The district court also rejected FNL's claim that its demand for compensatory damages was a form of equitable restitution permitted by § 1132(a)(3). App. 38a.

The district court's decision was appealed to the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"). The Eleventh Circuit affirmed the trial court's decision, holding that ERISA pre-empted FNL's state law claims, that the trial court did not err in finding that FNL did not prove damages on its 75% participation claim, that the district court did not err in determining that Ayers was not an agent of Sunshine when he paid claims, and that based on the facts of this case, 29 U.S.C. § 1132(a)(3) did not permit an award of compensatory damages to FNL for benefits paid on behalf of Sunshine employees who allegedly were not eligible under the plan. App. 19a.

FNL subsequently filed its petition for writ of certiorari to this Court.

SUMMARY OF ARGUMENT

FNL asserted in its petition that the decision of the Eleventh Circuit in this action is contrary to or inconsistent with decisions rendered by this Court regarding pre-emption of state law claims by ERISA and the availability of monetary awards pursuant to ERISA and that the precise questions here presented have not been finally settled by this Court. (FNL's petition at 4-5). FNL further represented that questions presented by its petition have generated divergent opinions among the circuit courts of appeal and state supreme courts.

FNL's assertions, while skillfully stated, are without merit and the petition is due to be denied. The standard applied by the Eleventh Circuit in this case regarding whether a state law claim is pre-empted by ERISA is consistent with the decisions of this Court and the other circuit courts of appeal. FNL does not dispute that state law claims which are sufficiently related to an ERISA plan are pre-empted. Nor does it dispute that the ERISA pre-emption provision is deliberately expansive. Rather, FNL merely disputes the factual determination by the district court and the Eleventh Circuit that FNL's state law claims are pre-empted because they are sufficiently related to an employee welfare benefit plan.

FNL sought an award of compensatory damages under 29 U.S.C. § 1132(a)(3) which provides that a plan fiduciary may "obtain other appropriate equitable relief . . . " for violations of the provisions of a plan. FNL contends that Sunshine violated certain policy provisions, and that FNL, as a plan fiduciary, has a right for equitable relief which can include compensatory damages if such an award is necessary to do complete justice. (FNL petition at 16, 18).

FNL's position ignores several crucial points. First, ERISA is structured to protect the plan, plan participants, and plan

beneficiaries. Indeed, under 29 U.S.C. § 1132(a)(2), a fiduciary may seek relief only on behalf of the plan and the benefits must inure to the plan. FNL brought this suit solely for its benefit. Although the district court permitted FNL to attempt to prove it was entitled to relief under 29 U.S.C. § 1132(a)(3) (App. 28a), and while it may be argued that equitable remedies under § 1132(a)(3) may incorporate an award of monetary damages under appropriate circumstances, the primary relief must be equitable in nature. FNL attempted to convert its claim for compensatory damages into an equitable remedy contending it was entitled to the equitable relief of an accounting and of restitution and that monetary relief may be awarded as an incident to such equitable relief. Based on the facts before the lower courts, they held that FNL was not entitled to an accounting or restitution. In summary, predicated on the facts before them both courts held that FNL's claim for relief was legal, not equitable in nature, and that it did not qualify for relief under § 1132(a)(3). Moreover, FNL had an opportunity to prove damages and could not.

There may be areas of the law surrounding ERISA which deserve to be addressed by this Court. No such issues are before the Court on this appeal. The decisions of the district court and the Eleventh Circuit were based upon the application of the facts of this case to recognized principles of law. FNL's petition, it is respectfully submitted, is due to be denied.

ARGUMENT

A. ERISA Pre-empts FNL's State Law Claims.

FNL alleged state law claims against Sunshine for breach of contract, breach of the duties of due care and good faith, willful and wanton conduct, misrepresentation and failure to disclose material facts. These claims arose from the group insurance policy issued by FNL to Sunshine. FNL does not challenge the Eleventh Circuit's decision that the policy was part of an employee benefit plan covered by ERISA. It does not dispute that claims which relate to a plan are pre-empted by

ERISA. Rather, FNL contends that its state law claims should not be pre-empted because its claims are consistent with ERISA, that its state law claims do not "relate to" an employee benefit plan and, therefore, that those claims are outside the scope of ERISA's pre-emptive power. FNL also asserted that pre-emption is inappropriate because FNL has no adequate remedy under ERISA for the wrongs allegedly committed by Sunshine.

A review of the applicable law reveals the error of FNL's position. This Court held: "In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95, 103 S.Ct. 2890, 2899, 77 L.Ed.2d 490, 500 (1985). Under ERISA, Congress' intent is set forth expressly in the statutory language, which pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). This Court has not limited pre-emption only to state laws specifically designed to affect employee benefit plans[1] and has consistently recognized the expansive sweep of the pre-emption clause.[2] The pre-emption provision is "deliberately expansive in design to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39, 46 (1987).

As noted by this Court, the breadth and importance of ERISA's pre-emption provision were stressed by House and Senate sponsors alike. 481 U.S. at 46. The "reservation to Fed-

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[1] *Shaw v. Delta Airlines, Inc.*, 463 U.S at 98 (1983).

[2] *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990); *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981).

eral authority [of] the sole power to regulate the field of the employee benefit plans" was described by Representative Dent as ERISA's "crowning achievement." 120 Cong. Rec. 29197 (1974). According to Senator Williams, ERISA's provisions "are intended to pre-empt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulations for employer benefit plans. This principle is intended to apply in its broadest sense to all actions of state or local governments, or any instrumentality thereof, which have the force or effect of law." *Id.* at 29933.

Where a "patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, this Court has applied ERISA's pre-emption clause to ensure that benefit plans be governed only by a single set of regulations." *Fort Halifax Packing Co. v. Wayne*, 482 U.S. 1, 11, 107 S.Ct. 2211, 2217, 96 L.Ed.2d 1 (1987). *See, FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990). Based thereupon, this Court has held that "the pre-emption provision ... displace(s) all state laws that fall within, its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. at 829.

FNL's plea that its claims would in no way impair the plan or the public's interest in encouraging the formation of employee benefit plans is without merit. There possibly could be no greater impediment to the formation or administration of benefit plans than fifty different sets of state laws which would impose varying standards on those establishing benefits plans and subject them to potentially open-ended damages.

There are, however, instances in which "some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding the law 'relates to' the plan." *Shaw v. Delta Airlines, Inc.*, 463 U.S. at 101, n. 21. However, a state law "relates to" an employee benefit plan, and is thus subject to ERISA pre-emption, if it "has a connection with or reference to such plan." There is no dispute

among the circuits that this is the appropriate standard to apply in determining whether ERISA's pre-emptive effect precludes a state cause of action. The issue of whether state law causes of action have a connection with or reference to an ERISA plan sufficient to trigger ERISA pre-emption is a question of fact. Thus, the only issue on this appeal relating to pre-emption is a factual one—i.e., does the appropriate nexus with the plan exist to pre-empt state law claims? Here it does.[3]

The Eleventh Circuit properly noted that FNL sought damages based on Sunshine's alleged failure to adhere to the terms of the group policy which were incorporated into the welfare benefit plan and Sunshine's alleged mishandling of benefit payments. App. 10a-11a. The Eleventh Circuit concluded: "The claims asserted by FNL have an obvious connection with the plan in this case. They are founded upon Sunshine's alleged failure to adhere to its obligations under the group policy which funded Sunshine's welfare benefit plan. . . . The district court found that the plan incorporated the terms of the policy. These claims 'relate to' a welfare benefit plan." App. 11a.

The decision by the Eleventh Circuit that FNL's state law claims were sufficiently related to the Sunshine employee benefit plan to invoke the pre-emptive powers of ERISA was a factual one based on a uniformly accepted standard. Thus, the decision of the Eleventh Circuit on this issue, it is respectfully submitted, is not due to be reviewed by this Honorable Court.

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[3] In its petition, FNL refers to cases in which this Court, certain circuit courts of appeal and state courts have held that ERISA did not pre-empt certain state law claims because in those cases the specific claims involved were found not to "relate to" an ERISA plan based upon the particular facts of each case. (FNL's petition at 5). FNL requests this Court to "enter the 'thicket' " of ERISA pre-emption in an effort to resolve these alleged differences of opinion. FNL, however, fails to demonstrate how those cases have any significant similarity to, application to, or affect upon the case now before the Court.

B. FNL is not Entitled to Monetary Relief Under ERISA.

FNL sought an award of compensatory damages as a plan fiduciary. As noted by the district court:

> Congress authorized fiduciaries to bring actions under ERISA in two situations pertinent to this action. A fiduciary may sue for breach of fiduciary duty. 29 U.S.C.A. § 1132(a)(2); *see also id.* § 1109. The fiduciary may also sue: 'to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of [ERISA] or the terms of the plan.' § 1132(a)(3)(A), (B).

App. 30a.

Apparently, FNL contended that the group policy was part of the plan; that Sunshine, by allegedly violating the terms of the policy, violated the terms of the plan; and that FNL as a plan fiduciary has a right to seek "other appropriate equitable relief . . . to redress such violations. . . ." FNL asserted that equitable relief may include an award of monetary damages "if necessary to do complete justice." (FNL's petition at 15).

FNL's position ignores two critical points. First, ERISA is structured to protect the plan, plan participants, and plan beneficiaries. Indeed, under § 1132(a)(2), a fiduciary may seek relief only on behalf of the plan and the benefits must inure to the plan. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 105 S.Ct. 3085, 3090, 87 L.Ed.2d 96, 102 (1985). FNL brought this suit solely for its benefit. It did not even attempt to characterize its suit as in any way benefiting the plan or the beneficiaries thereunder. Thus, FNL cannot bring suit pursuant to § 1132(a)(2).[4] Although the district

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[4]FNL urges this Court to rely on *Warren v. Society Nat'l Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2256, 114 L.Ed.2d 709 (1991). The Sixth Circuit in *Warren* held that "other appropriate equitable

court permitted FNL to attempt to prove it was entitled to relief under § 1132(a)(3) (App. 48a) and while it may be argued that equitable remedies under § 1132(a)(3) may incorporate an award of monetary damages under appropriate circumstances, the primary relief must be equitable in nature.

1. *FNL is not entitled to an accounting.*

FNL attempted to convert its claim for compensatory damage into an equitable remedy contending it was entitled to the equitable relief of an accounting and, if such relief was ordered, that monetary relief may be awarded as an incident to that equitable remedy. This claim was based in part on FNL's assertion that Sunshine owed FNL a fiduciary duty.

Sunshine was a fiduciary, as was FNL, with respect to the plan and its beneficiaries. Sunshine was not a fiduciary with respect to FNL. Fiduciary duties under ERISA, as under the common law of trusts, run vertically, not horizontally, *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. at 152-53.

Nevertheless, FNL asserted Sunshine owed it a fiduciary duty because it allegedly relied upon Sunshine to report the status of its employees so as to permit FNL to determine its rights under the policy. FNL further alleged that only Sunshine could perform the function because FNL had no access

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relief" under § 1132(a)(3) for breach of fiduciary duties set forth in § 404(a) may include the award of monetary damages in order to put a beneficiary in a position in which he would have been if the trustee had not committed the breach of trust. 905 F.2d at 981. The Sixth Circuit relied upon the duties running directly from plan fiduciaries to plan beneficiaries in the administration and payment of trust benefits. The Sixth Circuit also found that the breach of such fiduciary duty resulted in the loss to a beneficiary of one of the most significant benefits available under ERISA. In the case currently before this Court, there has been no breach of a fiduciary duty causing a loss to a beneficiary. To the contrary, the district court and the Eleventh Circuit specifically found that no fiduciary relationship existed between FNL and Sunshine. (App. 33a, 12a). The propriety of those decisions is discussed in the text, *infra.* Thus, the Sixth Circuit's decision in *Warren* is inapplicable and of no comfort to FNL.

to the needed information except through Sunshine and Sunshine did not respond to FNL's request for information which would assist in making that determination.

The Eleventh Circuit discarded FNL's assertion holding:

> Nor was the relationship between FNL and Sunshine such that Sunshine could be held accountable as a fiduciary. FNL entered into the policy with Sunshine as part of an arms-length transaction. FNL was free to negotiate such terms as it thought necessary for its protection. It did not enter this transaction dependent on the whim of Sunshine; in fact, FNL drafted the policy to serve as the basis of the welfare benefit plan. FNL's claims that it could not examine Sunshine's records are not sufficient to establish a fiduciary duty on the part of Sunshine to make an accounting. Moreover, as the District Court noted, Sunshine's records were made available to FNL in the course of this suit. In light of the fact that FNL had the opportunity to examine the records, it is not clear why it would be entitled to an order directing Sunshine to make an accounting. FNL has shown no circumstances to justify such an order. We find no error in the district court's refusal to order an accounting.

App. 12a-13a. Thus, the Eleventh Circuit affirmed the district court's factual determination that Sunshine did not owe a fiduciary duty to FNL. This again is not a dispute as to law, but as to fact which, it is respectfully submitted, is not due to be reviewed by this Court.

2. *FNL is not entitled to relief for payments made on behalf of allegedly ineligible employees.*

Apparently realizing the tenuous nature of its claim for an accounting, FNL also sought to come within the purview of § 1132(a)(3) by labeling its demand for compensatory dam-

ages as being based on the equitable remedy of restitution. Specifically, FNL alleged that at the time certain claims accrued the claimants were either no longer Sunshine employees or did not meet the eligibility requirements of the insurance policy. FNL sought over $40,000 in damages for these alleged violations. However, of this $40,000, a claim for $24,000 was rejected by the trial court on the grounds that FNL raised the claim too late in the litigation and that to permit FNL to press the claim at such a late juncture would unfairly prejudice Sunshine. App. 36a. FNL's claim for unauthorized payments realistically is $16,000. The district court rejected FNL's claim for damages for benefits paid by FNL on behalf of allegedly ineligible employees who were enrolled in the plan or to their health care providers because compensatory damages are a form of legal, not equitable, relief which is unavailable under 29 U.S.C. § 1132(a)(3). App. 37a.

The district court also held that restitution is an equitable remedy designed to restore to a plaintiff something that was wrongfully in the possession of another. *See* Restatement of Restitution (Second), § 1. The district court found that restitution was inappropriate because the alleged overpayments did not go to Sunshine, but instead went to beneficiaries or to health care providers. App. 38a. The Eleventh Circuit concurred. App. 18a.

Furthermore, the district court noted that FNL may have a claim for equitable restitution against the parties to whom payments allegedly were inappropriately made. App. 38a. *See Blue Cross and Blue Shield of Ala. v. Weitz*, 913 F.2d 1544, 1549 (11th Cir. 1990). FNL has made no such attempt.

In conclusion, the district court succinctly disposed of FNL's attempt to convert a legal claim for compensatory damages into a claim for "equitable relief" under § 1132(a)(3) holding:

> But in this case, First National seeks no primary equitable relief. Its claims is for compensatory damages, and to cast these damages as equitable in nature un-

> der these circumstances would apparently write Congress' intent limitation of recoveries under § 1132(a)(3) to such [equitable] relief out of the statute. This the court cannot do.

App. 37a. The Eleventh Circuit concurred. App. 17a. Thus, this issue, it is respectfully submitted, is not appropriate for review by this Court.

3. *FNL failed to prove lost profits.*

Although the circuits recognize that the preclusion of a remedy does not bar the operation of ERISA pre-emption,[5] FNL complains that the decision of the lower courts denied it a remedy. Such is not the case. The district court tried FNL's claims under § 1132(a)(3) in open court. FNL was simply unable to prove it was entitled to relief. FNL was given the opportunity to prove damages based on lost profits under ERISA and could not. The district court held that FNL failed to prove its claim of $247,000 for lost profits for Sunshine's alleged failure to require 75% of its eligible employees to be enrolled in the plan. The district court found:

> Sunshine Jr. presented significant evidence showing, to the extent past profit experience with similar ventures provide some hint of expected profits, that First National's profit estimates were implausibly rosy. FNL's main witness admitted that no insurer can say with reasonable certainty what its ratio of claimed premiums will be for any given group and First National's main witness admitted as much. As is often the case with pleas for lost profits, the plaintiff has

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[5] *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 11 (2d Cir. 1992); *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991); *Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 757 (5th Cir. 1990); *Straub v. Western Union Tel. Co.*, 851 F.2d 1262, 1265-66 (10th Cir. 1988); *Northwestern Adm'rs, Inc. v. B.V. & B.R., Inc.*, 813 F.2d 223, 226-67 (9th Cir. 1987); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

> simply not proved its damage figure with a reasonable degree of certainty.

App. 34a. The district court held that FNL did not prove that the alleged violation of the 75% requirement caused FNL any harm and held that the insurance contract between the parties expressly limited a remedy available to FNL for any failure by Sunshine to meet this requirement to termination of the policy. App. 32a-33a. The Eleventh Circuit concurred. App. 14a. This factual determination, it is respectfully submitted, is not appropriate for review by this Court.

4. *Sunshine was not responsible for adjusting claims.*

FNL claimed $6,700 for alleged overpayments of claims made by the insurance agent Ayers. FNL contends that Ayers was an agent of both Sunshine and FNL, that Ayers acted for Sunshine to the detriment of FNL and therefore contributed to the damages suffered by FNL because a principal is liable for the acts of its agent performed in the fulfillment of the principal's business. This is another attempt by FNL to have this Court review a finding of fact made by the District Court and affirmed by the Eleventh Circuit.

Ayers was an insurance broker in Tallahassee, Florida who was a licensed agent of FNL. He had been licensed with FNL prior to the time he did business with Sunshine. FNL seeks repayment from Sunshine of certain amounts paid to plan beneficiaries beyond levels required by the plan which allegedly resulted from errors committed by Ayers in processing claims.

The district court determined that Ayers may have acted as Sunshine's agent with respect to advice and services in obtaining insurance for its employee benefit plan. On the other hand, the trial court held that: "The evidence showed that either Ayers acted independently in processing claims or that he acted as FNL's agent in this function." App. 35a. The Eleventh Circuit properly held that this decision was subject to

review under the clearly erroneous standard and that the evidence did not support FNL's position. App. 15a. To the contrary, the Eleventh Circuit held that evidence was presented at trial which established Ayers processed claims on behalf of and under the supervision of FNL and if Ayers had not processed the claims, FNL would have performed the task. App. 16a. Moreover, Ayers received a 6% commission from FNL as compensation for his work. Not only is the issue raised by FNL a factual one, it was decided properly. That decision, it is respectfully submitted, is not appropriate for review by this Court.

CONCLUSION

As discussed above, the decisions of the district court and the Eleventh Circuit were correctly based on the application of recognized principles of law to the facts of this case. No grounds exist under Rule 10 of the Rules of the Supreme Court for granting FNL's petition. It is respectfully submitted that FNL's petition for a writ of certiorari is due to be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

	Page
Order of United States Court of Appeals for the Eleventh Circuit denying petition for rehearing and suggestion for rehearing *en banc*	1a
Judgment of United States Court of Appeals for the Eleventh Circuit	3a
Opinion of United States Court of Appeals for the Eleventh Circuit	6a
Judgment of United States District Court for the Middle District of Alabama, Northern Division	21a
Memorandum Opinion of the United States District Court for the Middle District of Alabama, Northern Division	23a
Order of United States District Court for the Middle District of Alabama, Northern Division	40a
29 U.S.C. Section 1109(a)	47a
29 U.S.C. Section 1132(a)	48a
29 U.S.C. Section 1144(a)	49a

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7535 & 90-7668

FIRST NATIONAL LIFE INSURANCE COMPANY,
an Alabama Corporation,
Plaintiff-Appellant,

versus

SUNSHINE JR. STORES, INC.,
a Florida Corporation,
Defendant-Appellee

FIRST NATIONAL LIFE INSURANCE COMPANY,
an Alabama Corporation,
Plaintiff-Appellant,

versus

SUNSHINE JR. STORES, INC.,
a Florida Corporation,
Defendant-Appellee

On Appeal from the United States District Court for the
Middle District of Alabama

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL 30 1992
MIGUEL J. CORTEZ
CLERK

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before:

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Court Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Band are also DENIED.

( ) A member of the Court in active service hearing requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson, III

UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7535
D.C. Docket No. 88-T-575-N

FIRST NATIONAL LIFE INSURANCE COMPANY,
an Alabama Corporation,
Plaintiff-Appellant,

versus

SUNSHINE JR. STORES, INC.,
a Florida Corporation,
Defendant-Appellee

90-7668
D.C. Docket No. 88-T-575-N

FIRST NATIONAL LIFE INSURANCE COMPANY,
an Alabama Corporation,
Plaintiff-Appellant,

versus

SUNSHINE JR. STORES, INC.,
a Florida Corporation,
Defendant-Appellee

Appeals from the United States District Court
for the Middle District of Alabama

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 13 1992
MIGUEL J. CORTEZ
CLERK

Before ANDERSON, Circuit Judge, CLARK*, Senior Circuit Judge, and BROWN**, Senior District Judge.

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Wesley E. Brown, Senior U.S. District Judge for the District of Kansas, sitting by designation.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

CLARK, Senior Circuit Judge, specially concurred and filed an opinion.

Entered: May 13, 1992
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabe
Deputy Clerk

ISSUED AS MANDATE: August 10, 1992

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

Nos. 90-7535, 90-7668.

FIRST NATIONAL LIFE INSURANCE COMPANY,
an Alabama Corporation,
Plaintiff-Appellant,

v.

SUNSHINE JR. STORES, INC.,
a Florida Corporation,
Defendant-Appellee.

FIRST NATIONAL LIFE INSURANCE COMPANY,
an Alabama Corporation,
Plaintiff-Appellant,

v.

SUNSHINE JR. STORES, INC.,
a Florida Corporation,
Defendant-Appellee.

May 13, 1992

Insurer under life and health policy used to provide funding for employee benefits program sued insured employer, claiming breach of contract, under both Alabama state law and ERISA. The United States District Court for the Middle District of Alabama, No. 88-T-575-N, Myron H. Thompson, Chief Judge, entered judgment for insured employer, and appeal was taken. The Court of Appeals, Wesley E. Brown, Senior District Judge, sitting by designation, held that: (1) ERISA preempted state law causes of action; (2) employer was not "fiduciary" of insurer under ERISA, in connection with its claims processing activity; and (3) employer was not entitled to attorney fees.

Affirmed

Clark, Senior Circuit Judge, concurred specially and filed opinion.

* * * *

Appeals from the United States District Court for the Middle District of Alabama.

Before ANDERSON, Circuit Judge, CLARK*, Senior Circuit Judge, and BROWN**, Senior District Judge.

WESLEY E. BROWN, Senior District Judge:

This suit concerns a group life and health insurance policy issued by First National Life Insurance Company ("FNL"). The policy was used to fund an employee welfare benefit plan established by Sunshine Jr. Food Stores, Inc. ("Sunshine") to provide health benefits to its employees. The policy was in effect from August 1, 1983, until August 1, 1986. On this latter date, Sunshine terminated its policy with FNL and obtained coverage from another insurer. FNL subsequently filed this action asserting various state claims against Sunshine, including breach of contract and misrepresentation, as well as a claim for relief under the Employee Retirement Income Security Act, ("ERISA") 29 U.S.C. § 1001, et seq. The district court held that all of the state law claims asserted by FNL were preempted by ERISA. The ERISA claims were tried to the court. After hearing the evidence, the district court determined that FNL was not entitled to relief and entered judgment in favor of Sunshine. FNL appeals, raising several grounds for error.

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Wesley E. Brown, Senior U.S. District Judge for the District of Kansas, sitting by designation.

Facts

Sunshine operates a chain of convenience stores. During the time period at issue here, Sunshine had about 2,000 employees. The company provided group health benefits to its employees through a fully insured plan. Eligible employees who wished to participate in the plan paid one-half of the premium for insurance benefits and Sunshine paid the other half. Prior to August of 1983, Sunshine provided benefits through a group policy with Aetna Insurance Company. In 1983, Sunshine began looking for another insurance carrier because of Aetna's rising premiums. The company contacted Frank Avers, an insurance broker in Tallahassee, Florida. With Ayers' aid, Sunshine eventually chose FNL as insurer for its plan. The new group policy between these parties took effect on August 1, 1983.

Under the policy, FNL provided health, medical, and disability coverage to all employees of Sunshine who worked a minimum of 30 hours a week or a minimum of 1,000 hours each year. Sunshine bore the responsibility of enrolling all employees who were eligible to participate and wished to do so. The policy provided that Sunshine would enroll at least seventy-five percent of its eligible employees in the plan.

The policy did not expressly set forth the details of how the plan was to be administered. Nevertheless, the parties followed a relatively well-defined allocation of administrative responsibilities. For every billing period, Sunshine prepared a computer printout of its currently enrolled employees, calculated and collected the appropriate premiums, and forwarded a premium check along with the printout to Frank Ayers. Ayers and his employees in turn copied the printout and forwarded the materials to FNL. FNL deposited the premium check into its general assets accounts.

As to the claims process, employes or their health care providers typically submitted claims to Sunshine. The company would verify the employment status of the claimants and forward the claims to Ayers. Ayers would then check the accuracy

of the claim and determine the appropriate rate under the policy. During the first year the policy was in effect, Ayers would send the claim to FNL, which would then issue a benefit check. In the later two years of the policy, FNL authorized Ayers to write benefit checks on its bank account. Ayers received a six percent commission from FNL on the Sunshine policy.

Sunshine ended its relationship with FNL in August of 1986, on the third anniversary of the policy. Again with Ayers' assistance, the company found a new insurer for its employee benefit plan. FNL later filed this suit. In addition to the claims asserted under state law, appellant sought monetary relief under ERISA based upon alleged breaches of the policy by Sunshine. The alleged breaches included the improper payment of benefits and the failure to maintain seventy-five percent employee participation in the plan.

Issues on Appeal

a. *Preemption*

The first issue raised by appellant FNL is whether the district court erred in finding that all of FNL's state law claims were preempted by ERISA. In its amended complaint, FNL alleged claims against Sunshine for breach of contract, breach of the duties of due care and good faith, willful and wanton conduct, misrepresentation, and an action under the Alabama Code for failure to disclose material facts. FNL apparently contends that these state claims should not be preempted because they do not "relate to" an employee benefit plan and are therefore outside the scope of ERISA's preemption clause. Appellant also suggests that the state law claims do not create a conflict with the purpose of the preemption provision. Finally, appellant argues that preemption is inappropriate because FNL has no adequate remedy under ERISA for the wrongs allegedly committed by the appellee.

We note initially that appellant does not challenge the district court's finding that the policy was part of an employee

welfare benefit plan covered by ERISA. *See* 29 U.S.C. § 1002. *See also Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) *(en banc)*. The district court found that the ERISA plan incorporated the terms of the group policy. R3-78-7. And, although Sunshine apparently had no formal written plan, the district court determined what the terms of the plan were at least in part from the course of dealing between FNL and Sunshine.

"In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95, 103 S.Ct. 2890, 2898, 77 L.Ed.2d 490 (1983). Under ERISA, Congress' intent is set forth expressly in the statutory language, which generally preempts any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). The preemption provision is "deliberately expansive and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987). The Supreme Court has consistently recognized the expansive sweep of the preemption clause. *Id.*

In *Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430 (11th Cir.), *cert. denied*, 493 U.S. 855, 110 S.Ct. 158, 107 L.Ed.2d 116 (1989), this court addressed the question of whether certain state law claims arising out of an alleged wrongful denial of benefits under an employee welfare plan were preempted by § 1144(a). The plaintiff in *Amos* asserted common law causes of action for bad faith refusal to pay benefits, fraud, and breach of contract. We concluded that the claims were preempted, stating "there can be no dispute that the common law causes of action asserted by the plaintiffs . . . 'relate to' an employee benefit plan and therefore fall within ERISA's express preemption clause." *Id.* at 431. *See also Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1469-70 (11th Cir. 1986).

In this instant case, FNL seeks damages based on Sunshine's alleged mishandling of benefit payments and its alleged failure to adhere to terms of the group policy which were incor-

porated into the welfare benefit plan. We must reject the argument that these claims do not "relate to" the employee benefit plan. Congress used the words "relates to" in their broad sense and did not mean to preempt only state laws specifically designed to affect employee benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983). A state law relates to an employee benefit plan if it "has a connection with or reference to such a plan." *Id.* The claims asserted by FNL have an obvious connection with the plan in this case. They are founded upon Sunshine's alleged failure to adhere to its obligations under the group policy which funded Sunshine's welfare benefit plan. *Cf. Amos*, 868 F.2d at 430. The district court found that the plan incorporated the terms of the policy. These claims "relate to" the welfare benefit plan.

Appellant maintains that preemption is not appropriate because its state claims are consistent with the purposes behind ERISA and the preemption provision. FNL argues that preemption of state laws was designed to preserve consistency and to prevent the imposition of conflicting requirements in benefit plans. According to FNL, the maintenance of its claims against Sunshine does not conflict with any of the objectives of ERISA. But the preemption provision displaces all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements. *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 829, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). Moreover, state contract and tort laws that impose varying standards upon the administrator of a welfare benefit plan create a significant potential for conflict with ERISA and thus are logically preempted. As we noted earlier, Congress deliberately wrote § 1144(a) in a broad manner in order to make pension plan regulation exclusively a federal concern.

Nor is the argument that ERISA provides an inadequate remedy a sufficient reason to overcome the application of § 1144(a). The question of preemption is a matter of congressional intent; it is not a question of which body of law—state

or federal— offers more protection to an aggrieved party. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986) ("To argue that Congress created a "'gap' in the law does not undermine the reasoning on which a finding of preemption is based."). The claims asserted here fall within the range of state laws that relate to an employee benefit plan. For these reasons, we find that the district court correctly held that the plaintiff's state law claims were preempted by ERISA.

b. *Relief under ERISA*

FNL's next argument is that the district court erred in refusing to order Sunshine to render an accounting to FNL. FNL believes it is entitled to an accounting to determine if Sunshine complied with the insurance agreement. FNL contends that Sunshine stood in a fiduciary capacity as to FNL and is therefore obligated to render an accounting. Appellant also argues that an accounting is appropriate because the accounts at issue were mutual and complicated.

The district court concluded that Sunshine was a fiduciary with respect to the plan, it was not a fiduciary with respect to FNL. FNL challenges this finding, contending that Sunshine's exclusive access to employee records rendered it a fiduciary with a duty to account to FNL. Clearly, the fiduciary duties outlined in ERISA are designed to protect the plan and its beneficiaries rather than those who administer the plan. *See e.g.*, 29 U.S.C. § 1002(21)(A) (defining "fiduciary" with respect to a plan). *See also* §§ 1104 and 1109. Appellant has not pointed to any ERISA provision that would impose a fiduciary duty upon Sunshine with respect to FNL. *Cf. Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139, 105 S.Ct. 3085, 3089, 87 L.Ed.2d 96, 102 (1985) (Under § 1109(a), the relevant fiduciary relationship is one with respect to the plan.) Nor was the relationship between FNL and Sunshine such that Sunshine could be held accountable as a fiduciary. FNL entered into the policy with Sunshine as part of an arm's-length transaction. FNL was free to negotiate such terms as it thought necessary for its protection. It did not enter this transaction

dependent on the whim of Sunshine; in fact, FNL drafted the policy that served as the basis of the welfare benefit plan. FNL's claims that it could not examine Sunshine's records are not sufficient to establish a fiduciary duty on the part of Sunshine to make an accounting. Moreover, as the district court noted, Sunshine's records were made availab le to FNL in the course of this suit. R3-78-21. In light of the fact that FNL had the opportunity to examine the records, it is not clear why it would be entitled to an order directing Sunshine to make an accounting. FNL has shown no circumstances to justify such an order. We find no error in the district court's refusal to order an accounting.

Appellant's next assertion of error relates to its claim for damages arising out of Sunshine's alleged failure to insure the minimum level of participation specified in the policy. Under the FNL policy, Sunshine promised to enroll seventy-five percent of all eligible employees in the plan. FNL argued that Sunshine's alleged failure to meet this requirement resulted in loss profits of approximately $234,000. The district court, after hearing the evidence, denied relief on this claim for two reasons. First, the court concluded that the contract between the parties specified that the only remedy for a breach of this duty was for FNL to terminate the policy. Second, the court found that FNL failed to prove any damages from the alleged breach. FNL disputes both of these findings. We need not address the first finding by the district court because we conclude that the second finding is dispositive of appellant's allegation of error on its "seventy-five percent" claim.

Appellant's calculation of lost profits was based on an assumption that if additional Sunshine employees had been enrolled in the plan, the claims asserted by those employees would have amounted to seventy-five percent of the additional premiums that would have been generated. The district court found FNL's estimate was "entirely too speculative a basis on which to award relief." R3-78-14. The court observed that FNL "did not support its assertion that it would have enjoyed a 75% ratio of claims to premium income with any persuasive evi-

dence" and characterized FNL's profit estimates as "implausibly rosy." *Id.* By way of argument, FNL asserts the familiar rule that lost profits should not be denied simply because the amount of damages is difficult to ascertain. This rule is most often invoked when the difficulty in determining the amount of damages is a result of the defendant's wrongdoing. *See e.g., Anderson v. Mt. Clemens Pottery Company*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed.2d 1515 (1946). The rule is of no benefit, however, where the complaining party fails to prove that the defendant's conduct caused some injury. *Id.* at 688, 66 S.Ct. at 1192. In the instant case, the district court found that FNL "did not prove that this alleged violation of the plan caused it any harm." R3-78-13. This finding is a determination of fact that we will reverse only if it is clearly erroneous. Fed.R.Civ.P. 52(a). In this instance the district court was not clearly erroneous. There was evidence presented from which the court could have reasonably concluded that increased participation by Sunshine employees would not have resulted in any profit to FNL. The court may have found persuasive the evidence suggesting that FNL's group policies were operating at a loss. Sunshine introduced evidence tending to show that FNL's average loss ratio on group policies was much higher than FNL estimated—high enough that FNL might have lost money on such groups. The court noted that the years covered by this suit were considered peak bad years for health care insurers and that FNL in large part left the group health insurance field shortly after this incident. In addition, FNL's witnesses acknowledged that they could not state with any reasonable certainty what the loss ratio would have been if the additional Sunshine employees had been enrolled in the plan. Considered as a whole, the record supports the district court's finding. FNL had the burden of demonstrating that it suffered damages from the alleged breach by Sunshine.

c. *Agency*

Part of FNL's claim was that Frank Ayers, an insurance agent, made improper overpayments to beneficiaries of the

plan. FNL argued in the district court that Sunshine was liable for these overpayments because Ayers was acting as the agent for Sunshine when he paid the claims. The trial court, however, found that "either Ayers acted independently in processing claims or he acted as First National's agent in this function." R3-78-16. The court further stated that "First National, not Sunshine Jr., monitored and supervised Ayers in processing claims. . . . " *Id.* Appellant believes these findings are erroneous.

As appellant recognizes, the district court's determination of this issue is subject to review under the clearly erroneous standard. We will not reverse "if the district court's account of the evidence is plausible in light of the record viewed in its entirety. . . . " *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). In light of this standard we have little trouble affirming the finding of the district court. Evidence was presented at trial which suggested that Ayers processed claims on behalf of and under the supervision of FNL. *See e.g.*, R.Vol. VII at 230-32. If Ayers had not processed the claims, FNL would have performed that task itself. *Id.* Pursuant to an agreement between Ayers and FNL, Ayers received a six percent commission from FNL as compensation for his work. FNL authorized Ayers to sign checks on the FNL account to make benefit payments. Taken as a whole, the evidence supports a conclusion that Ayers processed the claims as the agent of FNL. *See* Restatement (Second) of Agency § 1 ("Agency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.")

d. *Benefits paid to ineligible employees*

Appellant also sought damages from Sunshine under 29 U.S.C. § 1132(a)(3) for benefits paid to Sunshine employees who were no eligible under the health insurance plan. Pursuant to the course of dealing between FNL and Sunshine, Sunshine bore the responsibility for verifying the employment sta-

tus of claimants. FNL alleges that it paid over $40,000 to three claimants who were erroneously certified by Sunshine as eligible employes. FNL asked the court to award it compensatory damages for Sunshine's failure to insure proper certification of these employes. The district court held that even if Sunshine violated the terms of the plan, FNL was not entitled to any damages therefrom because such relief was not equitable in nature and was not authorized by § 1132(a)(3).

Section 1132(a)(3) authorizes a civil action to be brought:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations of (ii) to enforce any provisions of this subchapter or the terms of the plan.

The scope of the phrase "other appropriate equitable relief" has caused the courts some difficulty. In *Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173 (11th Cir. 1988), we held that a beneficiary could not obtain punitive damages under § 1132(a)(3). In so holding, we relied on the Supreme Court's observation in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 105 S.Ct. 3085, 3092, 87 L.Ed.2d 96, 106 (1985) that:

> the six carefully-integrated civil enforcement provisions found in section [1132] . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'

We also noted that the civil enforcement provisions of § 1132(a) focus heavily on the beneficiary's right to enforce

the terms of the plan and do not mention the recovery of extra-contractual damages. *Bishop*, 838 F.2d at 1174. We concluded that punitive damages did not come within the remedies authorized by § 1132(a)(3), stating: "Punitive damages are just that, damages, and are not ordinarily incorporated by the term 'equitable relief.' " *Id. (citing Sokol v. Bernstein*, 803 F.2d 5432, 537-38 (9th Cir. 1986)). In *Sokol*, the court declared that "it appears Congress used the word 'equitable' to mean what it usually means—injunctive or declaratory relief." Although this latter declaration may be somewhat over-restrictive, we cannot ignore the fact that the statute limits the relief available to equitable relief. Despite this, FNL has cast its claim as one for legal relief and argues that it is entitled to an award of compensatory damages for breach of the plan's terms. We must reject FNL's argument that the phrase "equitable relief" in § 1132(a)(3) authorizes an award of compensatory damages.[1] The omission of any mention of a right to legal remedies in § 1132(a)(3) must be taken as an indication of Congress' intent to limit the relief available under this section to that which is equitable in nature. *Cf. Bishop*, 838 F.2d at 1174 (Congress appreciated the distinction between legal and equitable remedies; the restriction of § 1132(a)(3)(B) to equitable relief shows that Congress did not intend to allow the recovery of punitive damages under § 1132(a)).

Restitution is an equitable remedy designed to restore to a plaintiff something of value that is wrongfully in the possession of another. *See* Restatement of Restitution (Second) § 1 ("A person who has been unjustly enriched at the expense of

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[1] We express no opinion as to whether a party in appellant's position might be entitled to some other relief under § 1132(a)(3) or relief under other ERISA provisions. For example, as Judge Clark points out in his concurring opinion, we do not have before us the issue of an insurance company seeking its premiums. Similarly, we are not called on to decide if ERISA enables a party such as FNL to recover on its own behalf rather than on behalf of a welfare benefit plan. We have addressed only those claims asserted by FNL on appeal.

another is required to make restitution to the other.") Section 1132(a)(3) undoubtedly authorizes a fiduciary in certain circumstances to bring an action for restitution to recover benefits mistakenly paid out. *See Blue Cross and Blue Shield of Alabama v. Weitz*, 913 F.2d 1544, 1549 (11th Cir. 1990). In *Weitz*, we found that a fiduciary of an ERISA plan could maintain an action for restitution under § 1132(a)(3) against a physician to whom payments were made in violation of the plan.

FNL argued in the district court that it was entitled to an award of restitution from Sunshine. The district court found that restitution was inappropriate, however, because the alleged overpayments did not go to Sunshine but instead went to beneficiaries or to health care providers. The court noted that FNL might have a claim for restitution against these third parties, *cf. Weitz, supra*, but concluded that FNL did not have a claim for restitution against Sunshine. Appellant has not argued on appeal that the district court's application of this principle of restitution was incorrect and we find no error in the court's ruling. We therefore affirm the district court's ruling on this issue.

No. 90-7668

In a cross-appeal, Sunshine contends that the district court erred by refusing to award Sunshine attorneys' fees. This issue is governed by 29 U.S.C. § 1132(g)(1), which provides in part: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." Sunshine contends that the district court abused its discretion in denying attorneys' fees because the suit by FNL had no basis under law. The district court specifically found, however, that FNL was not acting in bad faith in bringing the suit and that the lawsuit presented difficult and close questions of law. After weighing all of the factors, the district court determined that an award of fees was not warranted. This scenario does not show an abuse of discretion. The district court considered appropriate factors in determining whether attorney's fees

should be assessed and the conclusion reached was well within the broad range of discretion afforded to the trial judge.

Conclusion

The judgment of the district court is AFFIRMED.

CLARK, Senior Circuit Judge, specially concurring:

I concur in the result in this case but am troubled by some inferences in the opinion. This case exemplifies a type of ERISA case we are seeing more often—the entire plan consists of an insurance policy. I agree with the majority that we have to look to 29 U.S.C. § 1132(a)(3), which is quoted on page 1552 of the opinion. That subsection authorizes the plaintiff insurance company, a fiduciary, to bring a civil action to obtain relief. The majority states on page 2421: "Appellant has not pointed to any ERISA provision that would impose a fiduciary duty upon Sunshine with respect to FNL." Further, on page 2424, the majority states: "We must reject FNL's argument that the phrase 'equitable relief' in § 1132(a)(3) authorizes an award of compensatory damages."

I can find no cases similar to this one, but my study of the statute leads me to conclude that a plaintiff situated as FNL here can collect compensatory damages under certain circumstances. I repeat that I concur in the result in this case because FNL failed to make out a case. Nevertheless, it is my view that an employer who secures a medical insurance policy on its employees becomes a co-fiduciary pursuant to § 1002(21)(A)(i):

> (21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, ... Such term includes any person designated under section 1105(c)(1)(B) of this title.

This conclusion finds support in the definitions of "plan sponsor" and "administrator" in § 1002.

Section 1132(a)(3) permits an insurance company/fiduciary to obtain an accounting from an employer/co-fiduciary that is necessary to allow the insurance company to properly administer the plan. This action would include requiring an employer to furnish the names of all employees, dates of employment, and other data necessary to insure coverage and payment of premiums by the employer for such coverage. Similarly, I conclude that subpart (ii) of this section—"to enforce any provision of this subchapter of the terms of the plan"—permits the insurance company to bring an action for premiums owed for insurance coverage provided under the plan, even though such relief might not be strictly classified as "equitable."

Any other interpretation of the statute would frustrate the intention of the statute to include medical insurance plans within the provisions of ERISA. Insurance companies would be reluctant to engage in writing such policies if their rights to collect premiums were limited first by an interpretation that ERISA preempts all claims by such companies against employers, and then by an interpretation of ERISA that would limit such claims only to equitable claims and provide relief only for those who are beneficiaries of such plans. I am inclined to agree with the majority that ERISA preempts such an action, but I read § 1132(a)(3) broadly enough to require district courts to enforce all rights an insurance company has against an employer that stem from the policy and the relationship of the parties in administering the plan.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 88-T-575-N

FIRST NATIONAL LIFE
INSURANCE COMPANY, as [sic] Alabama
Corporation,

Plaintiff,

v.

SUNSHINE JR. STORES, INC., a
Florida Corporation,

Defendant.

FILED
JUL 5 1990
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court that judgment be and it is hereby entered in favor of defendant Sunshine Jr. Stores, Inc. and against plaintiff First National Life Insurance Company; and that take nothing by its complaint.

It is the further ORDER of the court that costs be and they are hereby taxed against plaintiff First National Life Insurance Company, for which execution may issue.

DONE, this the 5th day of July, 1990.

/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
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MEMORANDUM OPINION

In this lawsuit, plaintiff First National Life Insurance Company charges defendant Sunshine Jr. Stores, Inc. with violations of ERISA, the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§ 1001-1461. The charges relate to the roles of these two companies in Sunshine Jr.'s employee group health insurance plan. First National claims that Sunshine Jr. did not meet and maintain the 75% participation level required by the plan; that an agent of Sunshine Jr. committed numerous errors in processing claims resulting in improper payment of claims by First National; and that Sunshine Jr. improperly enrolled several persons on the plan. First National also asserts an accounting claim. For the reasons which follow, the court finds in favor of Sunshine Jr. as to all claims.

I.

Sunshine Jr. is a corporation which owns and operates a chain of convenience marts in five states in the southeastern portion of the United States. During the period of time encompassing this case, it had approximately 2,000 employees at any given time. The company provided group health benefits to these employees through a fully insured plan.[1] Participating employees essentially purchased a health insurance policy, partially subsidized by their employer. Eligible employees who wished to participate in the plan paid one-half of the premium for those insured benefits and Sunshine Jr. paid the other half. Prior to August 1983, Sunshine Jr. arranged these benefits through a group policy with Aetna Insurance Company. In 1983, because of rising premiums with Aetna, Sunshine Jr. began looking for another insurance carrier for its plan. The company contacted Frank Ayers, an insurance broker in Tallahassee, Florida. With Ayers's aid, Sunshine Jr. eventually replaced Aetna with First National as insurer in its plan. The new group policy between these parties took effect on August 1, 1983.

Under this policy, First National provided health, medical, and disability coverage to all employees of Sunshine Jr. who worked either a minimum of 30 hours a week or a minimum of 1,000 hours each year. Eligibility for benefits under this policy did not begin until an employee had worked for the company for six months. Under the plan, Sunshine Jr. bore the responsibility of enrolling all employees who were eligible to participate and wished to do so. The contract directed that the company would enroll at least 75% of its eligible employees on this policy. If a Sunshine Jr. employee was covered by a separate health insurance policy—for example, the employee's spouse's health insurance—then that employee

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[1] On the different means of structuring employee welfare benefit plans, including fully insured plans and self-insured plans with reinsurance, *see Drexelbrook Engineering Co. v. Travelers Ins. Co.*, 710 F. Supp. 590, 594-98 (E.D. Pa. 1989), *aff'd*, 891 F.2d 280 (3rd Cir. 1989) (table).

could opt out of coverage under the company's policy. This feature of the plan allowed such employees to avoid double coverage and payment of an additional premium.

The policy did not expressly set out all of the details of administration of the plan. The parties nonetheless followed a relatively well-defined allocation of administrative responsibilities. For every billing period, Sunshine Jr. prepared a computer printout of its currently enrolled employees, calculated an collected the appropriate premiums for this number, and forwarded a premium check along with the printout to Ayers. Ayers and his employees in turn copied the printout and forwarded the materials to First National. First National deposited the premium check into its general asset accounts.

As to the claims process, employees or their health care provides typically submitted claims to Sunshine Jr.[2] The company would verify the employment status of the employee and forward the claims to Ayers. Ayers would check the accuracy of the claim and determine the appropriate rate under the policy coverage provisions. During the first year of the policy's existence, Ayers would then send the claim to First National which would issue a benefit check. In the later two years of the policy, First National authorized Ayers to write benefit checks on First National's bank account. Ayers received a 6% commission from First National on the Sunshine Jr. policy.

Sunshine Jr. ended its relationship with First National in August 1986, on the third anniversary of the policy. Again with Ayers's assistance, the company found a new insurer for its employee benefits plan. First National later filed this suit.

II.

First National claims that it is entitled to relief for three different categories of wrongs by Sunshine Jr. First of all, the insurance company asserts that Sunshine Jr. did not meet and

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[2] Certain health care providers who were aware of the relationships of the actors in this plan submitted claim forms directly to Ayers.

maintain the 75% participation level mandated by the contract throughout the course of the policy. The insurance company seeks lost profits based on the employees whom Sunshine Jr. should have enrolled to meet this requirement. Second, First National asserts that Ayers committed numerous errors in processing claims, resulting in payments by First National beyond its contractual obligations. The insurance company claims that Sunshine Jr. is liable for the amount of these overpayments because Ayers was its agent at the time. Finally, First National claims that Sunshine Jr. enrolled on the plan several persons who were not full-time employees under the terms of the policy, resulting in the payment of claims by First National for which it had no actual duty to pay.

The first preliminary matter the court must address is whether First National has actually charged violations of ERISA. First National's amended complaint filed in this court contained eight counts; the insurance company charged Sunshine Jr. with several violations of state law, and in one count with a violation of ERISA. The core charges of this complaint were contractual in nature, asserting that Sunshine Jr. had violated conditions set forth in the group insurance policy. First National did not, and does not, contend that Sunshine Jr.'s violation of the terms of the plan resulted in harm to participants in its employee welfare benefits plan, however; First National pleads harm to itself arising from Sunshine Jr.'s violation of the terms of the policy.

In an order dated May 1, 1989, the court determined that Sunshine Jr. had maintained an employee welfare plan under the ERISA definition of such a plan. *See* Order of May 1, 1989, at 2-3.[3] Following from this ruling, the court also determined that First National's state law counts, including its breach of

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[3] The court relied on 29 U.S.C.A. § 1002(1); *Massachusetts v. Morash*, ___ U.S. ___, 109 S.Ct. 1668 (1989); *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277, 280 & n.3 (11th Cir. 1987); *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982 (en banc); *Tucker v. Employers Life Insurance Co.*, 689 F. Supp. 1973, 1976 (N.D. Ala. 1988).

contract claims, were preempted by ERISA. *Id.* at 4-5.[4] However, because ERISA provides a federal cause of action for violations of the terms of the employee welfare benefit plan, the court denied Sunshine Jr.'s motion for summary judgment as to the ERISA claims, and the case proceeded to trial only on these claims. *See* 29 U.S.C.A. § 1132(a); *see also id.* § 1109.

Sunshine Jr. does not deny that it formed an employee welfare benefit plan covered by ERISA, but it maintains that the insurance policy does not itself constitute the plan. The company argues that a breach of the terms of the insurance contract is not equivalent to a violation of the employee welfare benefit plan, in the context of a fully insured plan.

The court agrees that an employee welfare benefit plan as defined by ERISA transcends the nature of a common individual insurance policy. When it establishes such a plan for its employees, including a fully insured group plan, a company undertakes substantial legal duties toward the beneficiaries of the plan. *See* 29 U.S.C.A. § 1104. In contrast, the relationship between an insurance company and the insured, in the context of a common individual policy of insurance, is based on contractual duties; these duties are different in kind from the fiduciary duties of trust law. *See* Goldberg & Altman, *The Case for the Nonapplication of ERISA to Insurer's General Account Assets*, 21 Torts & Ins. L.J. 477, 481 (1986).[5] In addition, an employee welfare benefit plan has a type of independent legal status under ERISA; the plan can maintain and defend suits, and can

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[4] The court relied on *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549 (1987); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2880 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 108 S.Ct. 2890 (1983); *Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430, 431 (11th Cir.) (per curiam), *cert. denied*, ___ U.S. ___, 110 S.Ct. 158 (1989).

[5] It is clear that Congress fashioned ERISA from the perspective of trust law, including the emphasis on fiduciary duties rather than contractual relations. *See Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 152-53 & nn.6, 8, 156-57, 105 S.Ct. 3085, 3095-96 & nn.6, 8, 3097-98 (1985) (Brennan, [sic] J., joined by White, Marshall and Blackmun, JJ., concurring in the judgment).

also survive changes in its funding mechanism over time. As the Eleventh Circuit has observed, "The purchase of insurance is only a method of implementing a plan, fund, or program and is evidence of the existence of a plan but is not itself [an employee welfare benefit] plan." *Donovan v. Dillingham*, 688 F.2d 1367, 1375 (11th Cir. 1982) (en banc).

The differences between common individual policies of health insurance and ERISA plans do not necessarily mean that ERISA would not address a violation of the group policy at issue in this case. When an employer establishes an ERISA plan, that plan must have, as a practical matter, an ascertainable structure outlining the plan's benefits and the responsibilities of the various plan actors. Absent such structure, courts would encounter substantial difficulty in determining which plan actor had responsibility for performing plan functions. In the case of fully insured plans, if no other documents provide reference points for the structure of the plan, the court may permissibly look to the insurance policy for this structure. *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277, 280-81 (11th Cir. 1987), is just such a case. In *Belasco*, as here, the ERISA plan in effect incorporates the terms of the group policy. Thus, if Sunshine Jr. has indeed violated the terms of the policy between it and First National, it has violated as well the terms of its employee welfare benefit plan. First National has, therefore, charged violations under ERISA.

B.

The next preliminary issue is whether First National is a proper party to complain of violations of the plan. The insurance company purports to bring this action as a fiduciary of the plan. The evidence at trial established that First National was a plan fiduciary during the time the policy between it and Sunshine Jr. was in effect. Congress defined plan fiduciaries under ERISA in the following terms:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or

> discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C.A. § 1002(21)(A). This definition has been broadly construed by most courts. *See, e.g., Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Donovan v. Mercer*, 747 F.2d 304, 308 (5th Cir. 1984). While an insurer is not a plan fiduciary simply by virtue of the fact that it provides insurance, when the insurer exercises discretionary authority over the payment of claims or other aspects of the plan, it may assume fiduciary status under ERISA. *See* 29 C.F.R. § 2560.503(g)(2); *Baker v. Big Star Division*, 893 F.2d 288 (11th Cir. 1989); *American Federation of Unions v. Equitable Life Ins. Co.*, 647 F. Supp. 947, 953 (M.D. La. 1985), *aff'd in relevant part*, 841 F.2d 658, 664-65 (5th Cir. 1988); *Blue Cross and Blue Shield of Alabama v. Peacock's Apothecary, Inc.*, 567 F. Supp. 1258, 1265-66 (N.D. Ala. 1983).[6] First National was a fiduciary under both the first and third subsections of § 1002(21)(A), since it bore discretionary authority in the processing and payment of claims under the policy, and thus in the administration of the plan. The court further finds that First National bore authority and control for the same reason in the management and distribution of plan assets. *See Chicago Board Options Exchange v. Connecticut General*

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[6] *See also Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 737-38 (7th Cir. 1986), *cert. denied*, 482 U.S. 915, 107 S.Ct. 3188 (1987); *Arakelian v. National Western Life Ins. Co.*, 680 F. Supp. 400, 404 (D.D.C. 1987); *Jacobson v. John Hancock Mutual Life Ins. Co.*, 662 F. Supp. 1103, 1112 (D. Conn. 1987); *McNeese v. Health Plan Marketing, Inc.*, 647 F. Supp. 981, 984-85 (N.D. Ala. 1986); *The Sixty-Five Security Plan v. Blue Cross and Blue Shield of Greater New York*, 583 F. Supp. 380, 387 (S.D.N.Y. 1984).

Life Ins. Co., 713 F.2d 254, 260 (7th Cir. 1983); *Jacobson v. John Hancock Mutual Life Ins. Co.*, 662 F. Supp. 1103, 1107-11 (D. Conn. 1987).[7]

Congress authorized fiduciaries to bring actions under ERISA in two situations pertinent to this action. A fiduciary may sue for breach of fiduciary duty. 29 U.S.C.A. §§ 1132(a)(2); *see also id.* § 1109. The fiduciary may also sue: "to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of [ERISA] or the terms of the plan." § 1132(a)(A), (B).

First National has not stated a cause of action against Sunshine Jr. under § 1132(a)(2). Fiduciary duties under ERISA, as under the common law of trusts, run vertically, not horizontally. *See Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 152-53, 105 S.Ct. 3085, 3095-96 (1985) (Brennan, J., joined by White, Marshall and Blackmun, JJ., concurring in the judgment) (fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits). While Sunshine Jr. owes First National certain contractual duties, it has no fiduciary relationship with the insurance company. As the court noted above, the wrongs with which First National charges Sunshine Jr. relate to these contractual duties. Moreover, a fiduciary may seek relief under § 1132(a)(2) only on behalf of the plan, and the relief it obtains must inure to the plan. *Russell*, 473 U.S. at 141, 105 S.Ct. at 3089 (majority opinion). Again, the insurance company does not seek relief on behalf of the plan in this lawsuit.

Section 1132(a)(3) is not, on the other hand, necessarily concerned with fiduciary duties. Rather, the focus of that sec-

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[7] In a self-funded plan, the plan's assets are generated by employer contributions and maintained in separate plan accounts. But in a plan like Sunshine Jr.'s the insurance policy itself constitutes the plan's assets. The plan has shifted the risk of future health expenses to the insurer; it is this shift that constitutes the assets of the plan.

tion is on violations of the terms of the plan, whether or not such violations would rise to the level of a breach of fiduciary duty. Indeed, the universe of possible defendants under § 1132(a)(3) is not limited to fiduciaries. As the court noted above, the terms of the insurance policy between Sunshine Jr. and First National also constitute terms of the company's employee welfare benefits plan. Thus, since First National is a fiduciary of this plan, it has standing under the literal terms of § 1132(a)(3) to file an action to enjoin violations of that policy or seek other redress for such violations. The court finds that First National may maintain this action under § 1132(a)(3).[8]

C.

First National claims that it was damaged by Sunshine Jr.'s failure to comply with the policy's 75% participation requirement. The insurance company argues that this clause is critical to the viability of the plan, because it aids the insurer in its task of spreading the risk of health expenses. According to First National, the 75% participation requirement provides a safeguard against the threat of adverse selection. Adverse selection occurs when the least healthy segment of a company's workforce participates in the plan, while the most healthy segment does not, either because it can find less expensive insurance coverage elsewhere or because it simply accepts the risk of medical expenses itself. If strictly enforced, the 75% participation level limits the extent of adverse selection by forcing at least part of the lowest-risk segment of the company's workforce to participate in the plan. This segment presumably will continue a high ratio of premium income to the amount of claims it will generate. First National claims that it would

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[8] Since the court finds that the express terms of ERISA envision the type of action First National in this case, it need not address the question of whether First National has an implied right of action under the statute. *See Dime Coal Co., Inc. v. Combs*, 796 F.2d 394, 397-99 (11th Cir. 1986) (finding no implied right of action under ERISA for an employer to recover contributions erroneously converted to plan assets).

have netted approximately $234,000 profits during the three years of the plan, had Sunshine Jr. complied with the 75% requirement.

Sunshine Jr. admitted at trial that it never attempted to determine whether it was technically in compliance with the participation requirement. It stated that while such a determination was theoretically possible, the task would be a mammoth undertaking. The company employed roughly 2,000 people on any given day during the years 1983 through 1986. However, Sunshine Jr. also experienced extremely high turnover rates of employment. It in effect replaced its complete workforce twice over the course of a year. Thus, the company would generate roughly 6,000 employee records during a year's time. To determine whether the participation requirement was satisfied, Sunshine Jr. would have to retrieve each employee's enrollment card and determine whether that employee was eligible to participate, and whether she chose to participate.[9] Sunshine Jr. would also have to review that employee's payroll history to ensure that she had worked the requisite number of hours recently to remain eligible to participate in the plan. Although First National had the ability under its contractual relation with Sunshine Jr. to demand access to the records necessary to make this determination, it also never attempted to perform this task.

While the court does not doubt that the 75% participation clause contributes to some degree to the effective viability of an employee welfare benefit plan, it is convinced that First National may not recover damages for violation of the requirement. First of all, the insurance contract between the parties expressly limits the remedy available to First National for any failure by Sunshine Jr. to meet this requirement to termination of the policy. The pertinent section reads:

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[9]The evidence suggested that a significant percentage of Sunshine Jr. employees never submitted enrollment cards to their employer.

> The Insurance Company may terminate this policy on the first policy anniversary or on any premium due date thereafter, by giving written notice to the Policyholder at least thirty-one days in advance, if, on the termination date specified in such notice, the number of persons insured hereunder is less than the number of percentage of the persons eligible for insurance hereunder specified in the Schedule of Insurance.

First National concededly never attempted to invoke that remedy. Nor did the insurance company ever communicate its concern regarding participation levels to Sunshine Jr. for its response.

In any event, the company did not prove that this alleged violation of the plan caused it any harm. As noted above, First National claims approximately $234,000 as damages for violation of this requirement. In arriving at this figure, First National estimated, through a statistical study using First National's definition of an eligible employee, the amount of premiums it would have collected during the years of the policy if Sunshine Jr. had complied with the participation requirement.[10] The insurance company then assumed that it would pay only 75 cents of every dollar of premium out to beneficiaries in claims. After allowing for commissions, premium taxes, and additional overhead, First National estimated it would have made roughly $234,000 in profits off the additional employees enrolled on the plan.

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[10] First National's position at trial was that all employees who worked at least 30 hours a week or 1,000 hours each year and who had worked for Sunshine Jr. for at least six months were counted as eligible for purposes of determining the participation level. Sunshine Jr. maintained that employees who opted out of participation in the plan because of alternative coverage, such as coverage under a spouse's health plan, should not be included in the range of eligible employees for participation requirement purposes. Because First National cannot recover on this claim in any event, the court does not decide this issue.

Aside from the definitional and methodological differences between the parties, the court finds this estimate entirely too speculative a basis on which to award relief. First National did not support its assertion that it would have enjoyed a 75% ratio of claims to premium income with any persuasive evidence. On the contrary, Sunshine Jr. presented significant evidence showing, to the extent past profit experience in similar ventures provides some hint of expected profits, that First National's profit estimates were implausibly rosy.[11] The main point of the evidence, however, was that no insurer can say with reasonable certainty what its ratio of claims to premium will be for any given group, and First National's main witness admitted as much. As is often the case with pleas for lost profits, the plaintiff has simply not proved its damage figure with a reasonable degree of certainty, *see generally* 5 A. Corbin, Corbin on Contracts § 1022 at 135-47 (1964).

D.

First National also seeks repayment from Sunshine Jr. of certain amounts paid by First National to plan beneficiaries beyond levels required by the insurance contract. First National's position at trial was that these overpayments were the result of errors committed by Ayers in processing claims. First National asserts that Sunshine Jr. is liable for these overpayments on the theory that Ayers acted as Sunshine Jr.'s agent when he committed the errors, thus making Sunshine Jr. liable as a principal for its agent's mistakes. The amount of relief sought by First National under this theory is approximately $6,700.

The court finds that First National is not entitled to this figure. First National relies on the legal rule that a principal is

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[11] At one point, the president of First National admitted that the years covered by this litigation were peak bad years for health care insurers nationwide. The court also notes that First National in large part left the group health insurance field around or shortly after the termination of its contract with Sunshine Jr.

liable for the acts of its agents committed within the scope of the agency relationship. *See* Restatement (Second) of Agency §§ 140, *et seq.* (1958) The evidence adduced at trial that Ayers may have acted as Sunshine Jr.'s agent with respect to advice and services in obtaining insurance for its employee benefits plan. The evidence did not establish, however, that the scope of this agency agreement extended to Ayer's responsibilities in processing claims under the policy. *Id.* § 34 (scope of agent's authority determined in light of accompanying circumstances). On the contrary, the evidence established that Sunshine Jr. never bore responsibility under the contract or the terms of the plan for processing claims; the company only verified the employment status of the claimant, a matter unrelated to First National's theory of relief. The evidence showed that either Ayers acted independently in processing claims or he acted as First National's agent in this function. The court has already noted First National's discretion as a plan fiduciary in determining the validity of benefit claims under the policy. Significantly, First National, not Sunshine Jr., monitored and supervised Ayers in processing claims and conducted audits of his office in this regard. The court also notes that First National allowed Ayers to sign checks on its account to make benefits payments. Finally, when Ayers stopped processing the claims late in the life of the relationship between the parties, it was First National, not Sunshine Jr., who replaced Ayers in performing this function. In sum, the court finds Ayers did not act as Sunshine Jr.'s agent in processing claims under the policy. Thus, First National cannot recover from Sunshine Jr. for any mistakes made by Ayers in performing that duty.[12]

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[12] First National also asserts that Sunshine Jr. impeded the insurance company's attempts to collect overpayments by advising its employees not to reimburse First National. The insurance company can point to only one specific instance of such conduct, however. This instance relates only to an off-hand response by a Sunshine Jr. employee to the question of another employee, to the effect that if the second employee felt she was in the right, should not pay anything to First National. The court rejects First National's suggestion that this provides any basis for relief against Sunshine Jr.

First National finally seeks damages for benefits paid by the insurer to ineligible employees whom Sunshine Jr. enrolled in the plan, or to their health care providers. In each instance, at the time these claims accrued, the claimant was either no longer a Sunshine Jr. employee or no longer met the eligibility requirements of the insurance policy. As the court noted above, in the course of dealing between these parties, Sunshine Jr. bore the responsibility of verifying the employment status of a claimant before forwarding the claim to Ayers for processing and payment. First National seeks over $40,000 in damages as a result of these alleged violations of the plan.[13]

Even if Sunshine, Jr. effectively violated the terms of the plan by improperly enrolling employees, First National is not entitled to the relief it seeks for this violation: compensatory damages. It is settled law in this circuit that extra-contractual compensatory damages are a form of legal, not equitable, relief which is unavailable under § 1132(a)(3). *See, e.g., United Steelworkers v. Connors Steel Company*, 855 F.2d 1499, 1508-09 (11th Cir.), *cert. denied*, 109 S.Ct. 1568 (1989); *see also Bishop v. Osborn Transportation, Inc.* 838 F.2d 1173, 1174 (11th Cir.), *cert. denied*, 109 S.Ct. 90 (1988). Admittedly, the compensatory damages sought by First National differ somewhat from those sought in other reported § 1132(a)(3) cases. Typically, the issue arises when a beneficiary seeks compensatory damages for mental or emotional distress arising out of the failure to obtain benefits under the plan. First Nationals damages arose as

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[13] One component of this $40,000 figure is an alleged $24,000 payment by First National on a claim submitted by Vivian Carter. At trial, the court sustained Sunshine Jr.'s objection to introduction of evidence relating to this claim, on the grounds that First National had raised it too late in the litigation. This claim was not identified in the pleadings, nor in the pretrial order. The court agreed that allowing First National to press this claim at such a late juncture would unfairly prejudice the defendant.

The parties have briefed the question of the validity of this ruling in their posttrial briefs. In light of the court's conclusion that First National is precluded by the terms of ERISA from recovery of compensatory damages, the claim based on the Vivian Carter payment is in any event not viable.

an arguably more foreseeable consequence of Sunshine Jr.'s violation of the plan than did the emotional distress damages in *Connors Steel, supra*. However, this distinction does not have any bearing on whether the damages sought by First National are equitable or legal in nature; the fact remains that compensatory damages in most contexts are a traditional legal remedy. *See Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, ___ U.S. ___, 110 S.Ct. 1339, 1347 (1990); 5 J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice para. 38.19[1] at 38-172 to 38-173 (1988); *cf. Walker v. Ford Motor Co.*, 684 F.2d 1355, 1363-64 (11th Cir. 1982) (holding that "other equitable relief" available under Title VII does not include compensatory damages which are not concomitants of employment). It is true that a court of equity could always grant monetary damages as an incident to primary equitable relief, in order to afford a litigant complete recovery. *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, ___ U.S. at ___, 110 S.Ct. at 1348; 5 J. Moore, J. Lucas & J. Wicker, *supra* at para. 38.19[2]. But in this case, First National seeks no primary equitable relief. Its claim is for compensatory damages, and to cast these damages as equitable in nature under these circumstances would apparently write Congress's express limitation of recoveries under § 1132(a)(3) to such relief out of the statute. This the court cannot do.

First National characterizes the relief sought as "make-whole" relief. These semantical gymnastics are not helpful. Extra-contractual compensatory damages can be so characterized with equal ease; the beneficiary whose claim has been denied can be said to seek monetary damages to represent the value of the psychic harm suffered. Thus, by being compensated for the injury, the beneficiary is put in as good a position as she would have enjoyed had the injury not occurred. She is "made whole." But this exercise does not convert her claim for compensatory damages from a legal to an equitable remedy.

First National also insists that the relief it seeks from Sunshine Jr. is restitution. The court cannot agree. Restitution refers to a remedy designed to return to the plaintiff the value

of something that the defendant wrongfully received from plaintiff. *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, ___ U.S. at ___, 110 S.Ct. at 1348-49. First National made these overpayments to either beneficiaries or health care providers, not to Sunshine Jr. While First National might have a claim for restitution against these third parties, it clearly does not have such a claim against Sunshine Jr. *See Id.; see also* 5 A. Corbin, Corbin on Contracts § 996 at 17 (in determining) the amount of restitution recoverable, expenditures by the plaintiff are not included unless they were received by the defendants); Restatement of Restitution § 1 (1937).[14]

For the above reasons, First National is also not entitled to recover on its previously discussed claims that Sunshine, Jr. failed to meet the 75% participation requirement and that Sunshine Jr.'s agent committed errors in processing claims.[15]

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[14] In *TransAmerica Mortgage Advisor, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 100 S.Ct. 242 (1979), the Supreme Court found an implied private right of action under the Investment Advisers Act of 1940, 15 U.S.C.A. §§ 80b-1 to 80b-21, limited to the equitable remedies of rescission and restitution. The court opined that while an investor could recover the value of the consideration given under the investment contracts, less any value conferred by the other party, the injured investor could not recover for the diminution in value of her investment resulting from the defendant's breach of fiduciary duties. The Court deemed this loss in value to be compensatory in nature, and including it within the definition of restitution "could provide by indirection the equivalent of a private damages remedy that we have concluded Congress did not confer." *Id.* at 24 n.14, 100 S.Ct. at 249 n.14.

[15] The court recognizes that outside the context of ERISA the relief requested by First National would be available. However, today's result was apparently intended by Congress since it restricted § 1132(a)(3) to only equitable relief. *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564-65 (11th Cir. 1987) (noting that the practical eradication of any means of redress may be the necessary result of federal preemtion); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986) (same), *cert. denied*, 481 U.S. 1016, 109 S.Ct. 1893 (1987).

III

Finally, First National requests this court to order Sunshine Jr. to render an accounting. At common law, this equitable remedy appears to have been available in three situations: when a fiduciary relationship existed between plaintiff and defendant; when plaintiff and defendant maintained mutual accounts or if a one-sided account was particularly complicated; and when the plaintiff needed the accounting for discovery purposes. 1 Am. Jur. 2d *Accounts and Accounting* § 51 (1962). The court finds that First National has not proffered any predicate for this court to order an accounting in this case. Sunshine Jr. does not owe any fiduciary duty to First National, as the court noted above. First National also does not need the accounting for discovery purposes, since Sunshine Jr. has already made its records available to First National. The fact that First National may wish Sunshine Jr. to undertake the arduous task of reviewing the complete records of the history between the parties rather than perform this task itself is no basis for a court order. Although the scenario of particularly complex accounts is initially plausibly analogous to this case, the court concludes that First National is not entitled to an accounting under this theory either. First National has not alleged, nor does any evidence suggest, that Sunshine Jr. failed to submit the appropriate premium payments to First National for the number of employees enrolled in its plan at any given period of time. While First National does maintain that Sunshine Jr. should have enrolled more of its employees than it did, this charge does not relate to or support First National's request for an accounting. The action for an accounting is simply off-point and unrelated to First National's substantive disputes with Sunshine Jr.

An appropriate judgement will be entered.

DONE, this the 5th day of July, 1990.

/s/Myron H. Thompson

UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 88-T-575-N

FIRST NATIONAL LIFE INSURANCE COMPANY, etc.,
Plaintiff,

SUNSHINE JR. STORES, INC., etc., et al.,
Defendants.

FILED
MAY 1, 1989
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

ORDER

This action is now before the court on defendant Sunshine Jr. Stores, Inc.'s November 23, 1988 motion for summary judgement and on plaintiff First National Life Insurance Company's December 20, 1988 motion to strike the defendant's jury demand. For the reasons that follow, the motion for summary judgement is due to be granted in part and denied in part and the motion to strike the jury demand is due to be granted.

I.

This case involves disputes surrounding a group health insurance policy issued by First National to Sunshine Jr. in August 1983. The policy provided health, medical and disability coverage to all employees of Sunshine Jr. who worked a minimum of 30 hours per week. Under this plan, Sunshine Jr. was to enroll all eligible employees on the plan and to remit the

appropriate premium for that number of employees to First National. First National alleges that Sunshine Jr. enrolled ineligible persons on the policy, resulting in the payment of claims by First National for which it had no legitimate duty to pay. First National also claims that it paid certain "pre-certification penalties" which Sunshine Jr. refused to pay.

The amended complaint contains eight counts: one of these charges Sunshine Jr. with violations of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A. §§ 1001-1461; the other counts charge violations of state law under tort and contract theories. As this court noted in its September 8, 1988, order denying Sunshine Jr.'s motion to dismiss, the applicability of ERISA to the plan in this case is of critical importance because of the preemptive effect of that law on state law causes of action relating to employee benefit plans. The court turns first, therefore, to this issue.

II.

A.

By the terms of the Act, ERISA covers "employee welfare benefit plans" defined as:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . .

29 U.S.C.A. § 1002(1). *See Massachusetts v. Morash*, ___ U.S.___, 57 U.S.L.W. 4429, 4430 (U.S. April 18, 1989); *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277 280 & n.3 (11th Cir. 1987). The Eleventh Circuit has set forth an analytical framework for

determining coverage issues under ERISA, composed of five elements: (1) a "plan, fund, or program" (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits (5) to participants or their beneficiaries. *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982) (en Banc).

Although the parties appear oddly reticent to discuss the issue of ERISA's applicability to the group policy at issue in this suit, the court is of the opinion this plan is clearly an "employee welfare benefit plan" under ERISA. The plan covers expenses typical to health insurance plans, including medical expenses resulting from illness and accident, and it includes provisions relating to life insurance options as well. Without belaboring the issue, the court finds that the group health insurance plan in this case falls within the terms of § 1002(1). *See, e.g., Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430, 431 (11th Cir. 1989) (per curiam); *Tucker v. Employers Life Insurance Co.*, 689 F. Supp. 1073, 1076 (N.D. Ala. 1988).

B.

Delaying for the moment discussion of Sunshine Jr.'s arguments for summary judgement on the ERISA claim, the court next considers the viability of First National's other claims in light of ERISA's potent preemptive effect. These claims include a claim for an accounting, several fraud claims, willful and wanton misconduct on the part of Sunshine Jr. in its business dealing with First National, and breach of contract and of the duty to act in good faith. Recent cases establish that all of these common law causes of action are preempted by ERISA, requiring judgement in Sunshine Jr.'s favor on these claims as a matter of law.

The question of whether a certain state law action is preempted by federal law is fundamentally one of congressional

intent. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 1552 (1987). In the case of ERISA, Congress clearly and expressly signalled its intent that the Act would "supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," with certain exemptions. § 1144(a). The Supreme Court has time and again interpreted this preemption clause expansively, in light of the legislative history. *See Dedeaux, supra; Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890 (1983). The court has observed that § 1144(a) applies beyond "state laws specifically designed to affect employee benefit plans." *Shaw*, 463 U.S. at 98, 103 S.Ct. at 2900. A state law relates to an ERISA plan if "in the normal sense of the phrase, . . . it has a connection with or reference to such a plan." *Id.* at 97, 103 S.Ct. at 2900.

Each of the state law causes of action asserted by First National relates to the ERISA plan under this test. The Eleventh Circuit has recently addressed this question with reference to virtually the same causes of action, finding them preempted by the Act. *Amos*, 868 F.2d at 430. In *Amos*, the court also held that such causes of action did not fall within any of the exemptions to ERISA preemtive effect set forth in the statute. *Id.* Therefore, First National's state law causes of action are preemted by ERISA and summary judgement in Sunshine Jr.'s favor on those causes of action is in order.

C.

Sunshine Jr. also moves for summary judgement as to the ERISA claim, contending that First National lacks standing to seek relief under this statute. The Act provides:

> A civil action may brought—
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

> (B) to obtain the appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

§ 1182(a)(3)

First National purports to bring its ERISA claim as a fiduciary of the plan. The Act defines fiduciaries in the following terms:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management, or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such pla, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

§ 1002(21)(A). As noted by this court in its September 8, 1988, order, this definition has been broadly construed by most courts. *See e.g., Donovan v. Mercer*, 747 F.2d 304 (5th Cir. 1984); *McKinnon v. Cairns*, 698 F. Supp. 852 (W.D. Okla. 1988); *McNeese v. Health Plan Marketing, Inc.*, 647 F. Supp. 981 (N.D. Ala. 1986). Given that Sunshine Jr. concedes in its letter brief filed March 7, 1989, that First National retained authority and control with respect to the plan, and in the absence of evidence suggesting otherwise, the court is of the opinion based on the current record that First National may be a fiduciary empowered to bring suit by § 1002(21)(A).

Sunshine Jr. does not rigorously debate this point. Rather, the company argues that First National is not suing on behalf of anyone's interests but its own and that it is not attempting to preserve the integrity of the plan, which ended in August 1986. Sunshine Jr. does not cite authority to support its proposition that these are requirements under § 1132(a)(3), how-

ever, and the court finds no reason to doubt First National's contention that it is alleging violations of the terms of the plan by Sunshine Jr. Since such a complaint is expressly recognized by § 1132(a)(3), and since the court finds material issues of disputed fact going to this claim, Sunshine Jr. is not entitled to summary judgement as to First National's ERISA cause of action.

III.

To summarize, this court finds that the plan involved in this suit is covered by ERISA. The court also finds that ERISA preempts First National's causes of action based on state law and that summary judgement in Sunshine Jr.'s favor is proper as to these claims. The court denies Sunshine Jr.'s motion for summary judgement as to the ERISA claim.

With respect to First National's motion to strike Sunshine Jr.'s jury demand, the settled rule in this circuit is that a litigant does not possess a right to a jury trial in an ERISA action. *Chilton v. Savannah Foods & Industries, Inc.*, 814 F.2d 620, 623 (11th Cir. 1987); *Calamia v. Spivey*, 632 F.2d 1285 (5th Cir. Unit A 1980). Thus, the motion to strike is due to be granted.

Accordingly, it is ORDERED that defendant Sunshine Jr. Stores, Inc.'s November 23, 1988, motion for summary judgement be and it is hereby granted with respect to counts 1, 2, 4, 5, 6, 7 and 8 of the amended complaint and denied with respect to count 3.

It is further ORDERED that plaintiff First National Life Insurance company's December 20, 1988, motion to strike the jury demand, as amended on January 6, 1989, be and it is hereby granted.

It is further ORDERED that defendant Sunshine Jr. Stores, Inc.'s March 10, 1989, motion to strike, be and it is hereby denied.

It is further ORDERED that the nonjury trial of this cause is reset for June 8, 1989, at 9:00 a.m. in the second floor courtroom of the federal courthouse in Montgomery, Alabama.

The clerk of the court is DIRECTED to notify the attorneys by telephone.

DONE, this the 1st day of May, 1989.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 USCS § 1111].

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1).

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.